CLERK'S COPY.

1272
176.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES. 1905.

OCTOBER TERM, ~~1902.~~ ~~1903.~~ ~~1904.~~

No. ~~323.~~ 176.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED MAY 5, 1902.

(18,527.)

(18,527.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 323.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

INDEX.

	Original.	Print.
Caption	1	1
Declaration	1	1
Præcipe for summons	3	3
Summons	3	4
Marshal's return	7	5
Demurrer	7	6
Order submitting demurrer	9	6
Order overruling demurrer	9	7
Plea	9	7
Joinder of issue	10	8
Motion to amend declaration	11	8
Order to amend declaration	11	9
Order beginning trial	12	9
Plaintiff's Exhibit No. 1—Declaration in provisional court in case of Agueria *vs.* Fernandez	12	10
No. 2—Affidavit for attachment	14	11
No. 3—Affidavit for attachment	15	12
No. 4—Writ of attachment	16	12
No. 5—Notice of attachment	18	13
No. 6—Summons in provisional court	19	14
No. 7—Rule 17 of provisional court	20	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 20, 1903.

	Original	Print
Entries in Mayaguez journal of district court	21	16
Order of dismissal	21	16
Order making restraining order permanent	22	16
Order on exceptions	22	17
Judgment	23	17
Defendant's Exhibit A—Translation of mortgage	24	18
Order continuing trial	32	23
Order concluding trial	32	23
Verdict	32	24
Motion for new trial	33	24
Order overruling motion for new trial	33	25
Judgment	33	25
Agreement extending time to file bill of exceptions	34	25
Order extending time to file bill of exceptions	35	26
Agreement extending time to file bill of exceptions	35	27
Order extending time to file bill of exceptions	35	27
Assignment of judgment	36	27
Order allowing bill of exceptions	36	27
Bill of exceptions	37	27
Evidence for plaintiff	37	28
Exhibit 1—Declaration in provisional court	37	30
2—Affidavit for attachment	38	31
3—Affidavit for attachment	39	32
4—Writ of attachment	40	32
5—Notice of attachment	41	33
6—Summons and return	41	34
7—Rule 17 of provisional court	42	35
8—Order of dismissal	43	36
Order making restraining order permanent	43	36
10—Order on exceptions and judgment	43	36
Testimony of Jose Perez y Fernandez	44	37
Exhibit A—Mortgage	55	52
Testimony of Luis Bravo	61	59
Hubert Koberg	62	60
Frederick Phillippi	64	62
Alfred Koester	65	64
Eliseo Font y Gillot	66	65
Ignacio Gonzalez	67	66
Lucas Ramos	67	67
Jacinto Perez	68	68
Lucas Ramos (recalled)	70	70
Plaintiff rests	70	71
Motion for nonsuit overruled	70	71
Defendant's offers not set out	71	71
Charge to jury	71	71
Verdict	75	76
Judge's certificate to bill of exceptions	75	76
Appeal bond	76	77
Petition for writ of error and supersedeas	77	78
Motion for other and better security	77	78
Order allowing writ of error, &c	78	79
Assignment of errors	78	80
Bond on writ of error	79	80
Certificate of alcalde of Mayaguez	80	81

	Original.	Print
Orders for hearing as to bond	81	82
Motion for execution	81	82
Affidavit of sureties	82	83
Copy of writ of error	83	85
Copy of citation	84	86
Opinion	86	87
Order approving bond	89	89
Precipe for execution	90	90
Execution	91	90
Motion to quash execution, &c	92	91
Notice of motion to quash execution, &c	93	92
Order submitting motion to quash, &c	94	93
Opinion on motion to quash, &c	94	93
Order overruling motion to quash, &c	95	94
Clerk's certificate	96	94

1 THE UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

At a stated term of the district court of the United States for Porto Rico, within and for the district aforesaid, begun and held at the court rooms in the city of Mayaguez, on the first Monday of December, being the second day of that month in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-sixth.

Present: The Honorable William H. Holt, judge.

Among the proceedings had were the following, to wit:—

JOSE PEREZ Y FERNANDEZ, Plaintiff,
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and RAFAEL DIAZ AGUERRIA, Defendants. } Common Law.

Be it remembered, that heretofore, to wit, on the 18th day of November in the year of our Lord one thousand nine hundred and one came the plaintiff by his attorney and filed a declaration in this cause, which said declaration is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, Sitting at Mayaguez, December Term, 1901.

JOSE PEREZ Y FERNANDEZ, Plaintiff,
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and Rafael Diaz Aguerria, Defendants. } Declaration in Trespass on the Case for Wrongful Attachment.

Jose Perez y Fernandez, plaintiff, a subject of the King of Spain and a resident of Porto Rico, complains of Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria, subjects also of the King of Spain, and residents of Porto Rico, of the plea of trespass on the case, for that,

Whereas, plaintiff on the 4th day of January, 1900, and for several years prior thereto was engaged as a merchant doing a general commission business, in the city of Mayaguez, Porto Rico,
2 under the firm name and style of Perez, Ramos & Company, of which firm he was the principal owner, and as such was engaged in expensive and important business transactions throughout Porto Rico and between Porto Rico and foreign countries; was the owner of the warehouse and lot in which said business was conducted in Mayaguez as well as a brick house situated at number 10, Calle Peral, Ponce, and many other valuable properties in the said *in the said* district as aforesaid; and enjoyed individually and as a member of the said co-partnership or society of Perez, Ramos

& Company aforesaid, a large credit and good standing in the commerce of Porto Rico and foreign countries as aforesaid.

Plaintiff says that, notwithstanding this, the said defendants, Jose Antonio Perez, for himself and as attorney in fact and agent of and for defendant Rafael Diaz Aguerria, who was a party plaintiff to said suit, and who authorized and ratified all of the acts hereinafter mentioned, did, on or about the 4th day of January, 1900, as aforesaid, in the United States provisional court for the department of Porto Rico, at Mayaguez aforesaid, falsely and maliciously and without reasonable or probable cause make an affidavit for attachment against the goods and property of plaintiff, and falsely and maliciously and without reasonable or probable cause instituted in the said court a suit for the recovery of fifteen thousand (15000) pesos, Porto Rican currency, against the plaintiff, stating, as a ground for the said attachment that the said plaintiff in the said attachment suit had a good cause of action, therein, and that the said defendant, Jose Antonio Fernandez y Perez, had reason to believe that the defendant therein, plaintiff in this case, would fraudulently part with or sell his property before judgment could be recovered against him so that the judgment could not be satisfied out of said property; whereupon, upon the filing of said wrongful affidavit and the wrongful institution of such suit as aforesaid, the defendants herein wrongfully, vexatiously, maliciously and without probable cause, caused an attachment to issue against the store and warehouse and the lot upon which the same was situated and belonging to plaintiff and his said company, as aforesaid, and in which he was
3 conducting his business as aforesaid in the city of Mayaguez, and also against the brick house and the lot belonging to plaintiff situated at number 10 Calle Feral, Ponce, all of said property being of great value, and situated in Porto Rico.

Plaintiff says that the said writ of attachment as sued out in the said United States provisional court for the department of Porto Rico was levied by the marshal thereof, upon the properties aforesaid, all of which exceeded in value many times the amount of the debt for the collection whereof the said attachment was sued out. And the plaintiff says that the grounds of attachment alleged in the said affidavit did not exist and that defendants herein did not have any probable cause to believe that the said grounds, as alleged, did exist, and plaintiff alleges that the said action was wrongfully and maliciously instituted against plaintiff without probable cause.

Plaintiff alleges that before the commencement of this action the said attachment proceeding and the suit instituted by the defendants herein had been judicially investigated by the district court of the United States for Porto Rico and on or about the fourth day of June, 1901, the said district court of the United States for Porto Rico decreed that the said suit and attachment proceedings were not properly and legally instituted and determined the same against the defendants herein and in favor of the plaintiff herein, wherefore, plaintiff claims damages for that the defendant, under color of said attachment entered the plaintiff's warehouse and the properties above described, and wrongfully and maliciously interfered

with and greatly injured plaintiff's business and the business of the said firm of which he was a member, greatly mutilating, disarranging and injuring plaintiff's stock of goods, endangering and destroying his business and credit as a merchant, by which he was compelled to retire from business from the said firm and lose a large amount of money, and the said property as attached and the stock of goods owned by plaintiff were greatly depreciated in value, and plaintiff was damaged in the following sums, to wit:

4

Loss of profits during pendency of said attachment suit	$3500.00
Travelling expenses necessarily incurred in defending such suit	500.00
Counsel fees necessarily incurred in the defense of said attachment and suit	1000.00
Injury to business and credit directly resulting from the said attachment proceeding and suit	15000.00

All of which resulted to the damage of plaintiff in the sum of twenty thousand dollars ($20,000.00), for which he brings this suit.

(Signed) FRANCIS H. DEXTER,
Attorney for Plaintiff.
J. HERNANDEZ,
Attorney for Plaintiff.

(Indorsement:) Mayaguez, Common law, $70. Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria. Declaration. Filed clerk's office United States district court November 18, 1901. (Signed) Ricardo Nadal, clerk of the court.

And afterwards, to wit on the same day came the plaintiff by his attorney, and filed in the clerk's office of the court aforesaid his certain præcipe in the said case, which said præcipe is clothed in the words and figures following, to wit:

5 (*Præcipe.*)

In the District Court of the United States for Porto Rico, Sitting at Mayaguez, December Term, 1901.

JOSE PEREZ Y FERNANDEZ, Plaintiff, *vs.* JOSE ANTONIO FERNANDEZ Y PEREZ and Rafael Diaz Aguerria, Defendants.	Declaration in Trespass on the Case for Wrongful Attachment.

To the clerk of the court:

Please issue a writ of summons against Jose Antonio Fernandez y Perez, and Rafael Diaz Aguerria, residents of your district and subjects of the King of Spain, upon the complaint of Jose Perez y Fernandez, who sues in an action of trespass on the case to recover

damages in the sum — twenty thousand dollars against the said defendants, returnable to the December term of this court at Mayaguez.

(Signed) F. H. DEXTER,
Attorney for Plaintiff.

J. HERNANDEZ,
Att'y for Pl'ff.

(Indorsement:) No. 70 C. L. December term, 1901. Mayaguez. In the district court of the United States for Porto Rico. Jose Perez y Fernandez, plaintiff, *vs.* Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria, defendabts. Filed clerk's office United States district court. November 18 1901 (Signed) Ricardo Nadal clerk of the court.

And thereupon there was issued out of the clerk's office aforesaid our writ of summons in this case directed to the marshal of this district and against the said defendants, which said summons is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

José Perez y Fernandez

6 JOSÉ PERIZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ & RAFAEL DIAZ Aguerria. } Summons.

THE UNITED STATES OF AMERICA, *District of Porto Rico,* } *ss:*

The President of the United States of America to the marshal of the district court of the United States for Porto Rico:

You are hereby commanded to summon José Antonio Fernandez y Perez and Rafael Diaz Aguerria to appear before the above named district court of the United States for Porto Rico in the court room thereof, at the session of such court to be held in the city of Mayaguez, Porto Rico, beginning Monday, the second day of December next, 1901, and it being the regular December term of said court at the said city of Mayaguez to answer to the complaint of José Perez y Fernandez, all parties being subjects of the King of Spain, and residents in your district, in or near the said city of Mayaguez, in a common law suit of trespass on the case in which plaintiff demands twenty thousand dollars damages. Failing to so appear judgment by default will be entered against said defendants.

Witness, the Honorable Wm. H. Holt, judge of the said court and the seal thereof, this 18th day of November, 1901, and the 126th of our Independence at Mayaguez Porto Rico.

(Signed) RICARDO NADAL, *Clerk.*

Endorsement thereon: C. L. # 70. José Perez y Fernandez *vs.* José Antonio Fernandez y Perez, *et al.* Original summons Filed clerk's office United States district court November 18th, 1901. (Signed) Ricardo Nadal clerk of the court.

Marshal's fees, one service, $2.00.

7 And afterwards to*m* wit, on the same day, came the marshal of said district to whom the said writ was in form aforesaid directed and returned the same into the clerk's office of the court aforesaid with his proceedings thereon attached thereto clothed in the words and figures following, to wit:

DISTRICT OF PORTO RICO, *ss:*

I hereby certify and return, that on the 18th day of November, 1901, I received the within writ and after diligent search, I am unable to find the within named defendant Rafael Diaz Agueeria within my district.

(Signed) E. S. WILSON,
U. S. Marshal,
By WILHELM LUTZ,
Deputy U. S. Marshal.

Return on Service of Writ.

UNITED STATES OF AMERICA, }
District of Porto Rico, } *ss:*

I hereby certify and return that I served the annexed writ on the therein named José Antonio Fernandez y Perez by *ah*nding to and leaving a true and correct copy thereof with José Antonio Fernandez y Perez personally at Mayaguez in said district on the 18th day of November, A. D. 1901.

(Signed) E. S. WILSON,
U. S. Marshal,
By WILHELM LUTZ,
U. S. Deputy Marshal.

And afterwards, to wit, on the second day of December in the year last aforesaid came one of the defendants in this case by his attorneys and filed in the clerk's office of the court aforesaid, his certain demurrer in this case, which said demurrer is clothed in the words and figures following, to wit:

District Court of the United States in and for the District of Porto Rico.

JOSÉ PEREZ Y FERNANDEZ, Plaintiff,
versus
JOSÉ ANTONIO FERNANDEZ Y PEREZ, RAFAEL DIAZ AGUERRIA, Defendants.

Demurrer.

And the said defendant, José Antonio Fernandez, by his attorneys Horton and Cornwell, comes and defends the wrong and in-
8 jury, when, etc., and says that the plaintiff's said declaration and the matters and things therein contained in manner and form as the same *or* above set forth are not sufficient in law for him the said plaintiff to maintain his aforesaid action against this defendant and that he the said defendant is not bound by law of the land to answer same, and this he is ready to verify: wherefore for want of a sufficient declaration in this behalf the said defendant prays judgment, etc.

And the said defendant, Jose Antonio Fernandez, states and shows to the court the following causes of demurrer to the said declaration, that is to say, that it shows on the face of the said declaration, that defendant, Jose Antonio Fernandez y Perez, was acting as the duly authorized agent of the said Rafael Aguerria and was neither principal nor party plaintiff to the said action to recover fifteen thousand pesos against Jose Perez y Fernandez; and also that the declaration is in other respects uncertain, informal, and insufficient, etc.

(Signed) HORTON & CORNWELL,
Attorneys for Defendant Jose Antonio Fernandez y Perez.

(Indorsement:) Common law #70 Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria Demurrer. Filed clerk's office United States district court. December 2nd, 1901 (Signed) Ricardo Nadal, clerk of the court by H. H. Scoville, D. C. Horton & Cornwell attorneys for defendant Jose Antonio Fernandez.

And afterwards to wit, on the 3d day of December, A. D., 1901 an entry was made upon the journal of the said court in said cause which said entry is clothed in the words and figures following, to wit:

9 PEREZ Y FERNANDEZ *vs.* FERNANDEZ Y PEREZ. } C. L. #70.

Now comes attorney for the defendant and presents demurrer to the declaration which is submitted.

And afterwards to wit, on the 6th. day of December, A. D., 1901, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figure- following, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ ET AL. } C. L. #70.

Demurrer to declaration is overruled.

And afterw-rds, to wit, on the 7th. day of December in the year last aforesaid came one of the defendants in this cause by his attorneys and filed in the clerk's office of the court aforesaid, his certain plea in this case, which said plea is clothed in the words and figures following, to wit:

District Court of the United States in and for the District of Porto Rico.

JOSÉ PEREZ Y FERNANDEZ, Plaintiff,
vs.
JOSÉ ANTONIO F-RNANDEZ Y PEREZ, RAFAEL DIAZ AGUERRIA, Defendants.

Plea, Not Guilty.

And the said defendant, José Antonio Fernandez, by Horton and Cornwell, his attorneys, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid, to his charge in manner and form as the said José Perez y Fernandez hath above complained, and of this the said José Antonio Fernandez y Perez puts himself on the country.

(Signed) HORTON AND CORNWELL,
Attorneys for Defendant José Antonio Fernandez y Perez.

"Endorsement:" Common law #70 José Perez y Fernandez plaintiff *vs.* José Antonio Fernandez y Perez Rafael Diaz Aguerria defendants. Plea, not guilty of. José Antonio Fernandez y Perez, defendant F. H. Dexter, attorney for plaintiff. Horton & Cornwell, attorneys for defendant José Antonio Fernandez y Perez. Filed clerk's office United States district court. December 7, 1901. (Signed) Ricardo Nadal clerk of court by H. H. Scoville, D. C.

And afterwards to wit, on the same day came the plaintiff by his attorney, and filed in the clerk's office of the court aforesaid his certain joinder of issue which said joinder of issue is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto —, Sitting at Mayaguez, December Term, 1901.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ.

Joinder of Issue.

Now comes plaintiff above named and as to the plea of defendant herein pleaded in which he puts himself upon the country, plaintiff doth the like.

(Signed) F. H. DEXTER,
Att'y for Plaintiff.

Jose Perez y Fernandez being duly sworn upon his oath says that the facts and allegations above set forth are true and that he affirms the same.

(Signed) JOSE PEREZ.

Subscribed and sworn to before me this 6th, day of December 1901.

(Signed) H. H. SCOVILLE, *D. C.*

(Indorsement on joinder of issue:) Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez Joinder of issue Filed clerk's office United States district court De. 7th, 19–1. (Signed) Ricardo Nadal, clerk of the court By H. H. Scoville, D. C.

11 And afterwards, to wit, on the 9th day of December in the year last aforesaid, came the plaintiff in this case by his attorney and filed in the clerk's office of the court aforesaid his certain motion in this case which said motion is clothed in the words and figures following, to wit;

In the District Court of the United States for Porto Rico, Sitting at Mayaguez, December Term, 1901.

JOSE PEREZ
vs.
JOSE ANTONIO FERNANDEZ.

Motion to Amend Declaration.

Now comes plaintiff and moves the court for an order allowing the amendment of the declaration herein by substituting the word "Mayaguez" in place of the word "Ponce" where the same appears on pages "1" and "3" of said declaration—said amendment being formal and to correct a clerical error.

(Signed) F. H. DEXTER,
Attorney for Plaintiff.

(Indorsement on motion to amend:) C. L. # 70. Jose Perez *vs.* Jose Antonio Fernandez. Motion to amend declaration. Filed clerk's office United States district court Dec. 9th, 1901 (Signed) Ricardo Nadal, clerk of the court By H. H. Scoville, D. C.

And afterwards to wit, on the same day last aforesaid an entry was made on the journal of this court in said cause, which entry is clothed in words and figures as follows, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

Now comes the attorney for the plaintiff in the above entitled cause and presents a motion to amend the declaration, and upon hearing the attorney for the defense in opposition thereto, the motion is granted. The aforesaid amendment reads as follows: "By leave of, court first had this 9th day of December, 1901, plaintiff is permitted to amend his declaration by substituting the word 'Mayaguez' in place of the word 'Ponce' where the latter occurs in page 1 and page 3 of said declaration and the said declaration will be considered and read as so amended."

12 And afterwards, to wit, on the 11th day of December, A. D. 1901, an entry was made upon the journal of said court in said cause which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

This cause coming up for hearing both parties by their attorneys answer ready. The regular panel of jurors being exhausted the marshal is ordered to summon from among the bystanders one good and honest man to serve on the jury.

Whereupon the marshal summoned A. J. Wythe who qualified as a juror. The jury as elected and sworn was composed of the following named persons, to wit: Gerardo Castello, Alfredo Saliva, Alfredo Bravo, Sandalio Delgado, Jose Garcia, Felix Vidal, Henry Dick, J. J. Jimenez, Ulises Monagas, Adolfo Camps, Florencio Vera, and A. J. Wythe, who heard a part of the testimony.

And afterwards, to wit, on the 12th day of December, A. D. 1901, the plaintiff herein, by his attorney, filed a certain document as evidence, which said document is in the words and figures following, to wit:

Declaration.

In the United States Provisional Court for the Department of Porto Rico.

RAFAEL DIAZ AGUERIA, Executor Last Will and Testament — Claudio Barro, *vs.* JOSE PEREZ Y FERNANDEZ.	Assumpsit. Damages, $5,000.00.

Rafael Diaz Agueria, citizen of Spain, plaintiff executor of last will and testament of Claudio Barro, citizen of Spain, deceased, complains of José Perez y Fernandez, defendant, of a plea of trespass on the case on promisses. For that whereas in the lifetime
13 of the said Claudio Barro, to wit, on the 27th day of August in the year 1897 in the city of Colloto, province of Oviedo, Spain, the defendant made his promissory note and delivered the same to the said Claudio Barro thereby then and there promissed to pay on the 31st day of December A. D. 1897 the sum of $1000. Thereby then and there promissed to pay on the 31st day of December A. D. 1898 the sum of $1420. pesos. Thereby *by* then and there promissed to pay on the 31st day of December A. D. 1898 the sum of $1360 pesos in the city of Mayaguez, Puerto Rico, for value received by means whereof the defendant then and there at the time and place first aforesaid became liable to pay to the said Claudio Barro the said sums of money in the said promissory notes specified according to the tenor and effect thereof and being so liable the defendant in consideration thereof then and there promissed the said Claudio Barro to pay him the said sums of moneys according to the tenor and effect of the said notes. For money before that time lent by Claudio Barro to the defendant at his request. For money before that time paid and expended by Claudio Barro for the use of the defendant at his request. For goods, chattels and effects before that time sold and delivered by Claudio Barro to the defendant at his request.

Yet although the aforesaid day of payments in the said notes has elapsed the defendant has not paid any of the aforesaid amounts of said note or any part of them either to the said Claudio Barro in his life time or to the plaintiff since the death of the said Claudio Barro, nor has the defendant though thereto requested paid the several other sums of money above specified or any or either of them or any part thereof either to the said Claudio Barro in his life time or to the plaintiff since the death of the said Claudio Barro but to pay the same the defendant refuses to the damage of the plaintiff as executor as aforesaid of $5000.00 and therefore he brings his suit.

(Signed) HORTON AND CORNWELL,
Attorneys for Plaintiff.

14 Endorsement: Rafael Diaz Agueria, executor of last will of Claudio Barro *vs.* Jpsé Perez y Fernandez. Declaration in

assumpsit Damages $5000.00. Filed clerk's office United States provisional court January 2nd, 1900. (Signed) Robert Alexander, captain 14th infantry, clerk of the court by Ricardo Nadal deputy clerk.

U. S. district court for Porto Rico, December term, 1901, Mayaguez. Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez. Ex-ibit No. 1 for Plaintiff.

And afterwards, to wit, on the last day aforesaid there was introduced by the plaintiff herein by his attorney as evidence a certain Exhibit No. 2, which said exhibit is in the words and figures following, to wit:

In the United States Provisional Court for the Department of Porto Rico.

Affidavit for Attachment.

José Antonio Fernandez makes oath and says he is power of attorney of Rafael Diaz Agueria and that Rafael Diaz Agueria is the executo- of the last will and testament of Claudio Barro and that Rafael Diaz Agueria has a good cause of action therein and that affiant has reason to believe that the defendant intends to and will fraudulently part with or conceal his property before judgment can be recovered against him, so that said judgment cannot be satisfied out of said property.

(Signed) JOSE ANTONIO FERNANDEZ.

Subscribed and sworn to before me the 2nd day of January 1900 A. D. at Mayaguez, P. R.

(Signed) ROBERT ALEXANDER,
Captain 14th Infantry, Clerk United States Provisional —,
By RICARDO NADAL,
Deputy Clerk.

15 Endorsement: Affidavit Affiant José Antonio Fernandez to procure attachment on the property of Jose Perez Fernandez. Assumpsit. Damages $5000.00. Filed in the U. S. provisional court, January 2nd, 1900. (Signed) Robert Alexander captain 14th infantry, clerk of the court by Ricardo Nadal deputy clerk of the court.

U. S. district court for Porto Rico, December 10th, 1901, Mayaguez. José Perez Fernandez *vs.* Jose Antonio Fernandez y Perez. C. L. 70. Ex-ibit 2, for Plaintiff.

And afterwards to wit on the same day last aforesaid there was introduced as evidence by plaintiff herein a certain Exhibit No. 3, which exhibit is in the words and figures following, to wit:

In the United States Provisional Court for the Department of Porto Rico.

RAFAEL DIAZ AGUERIA
vs.
JOSÉ PEREZ Y FERNANDEZ. } Affidavit for Attachment.

José Antonio Fernandez makes oath and says — power of attorney — Rafael Diaz Agueria and that Rafael Diaz Agueria citizen of Spain is executor of the last will and testament of Claudio Barro, deceased, who was a citizen of Spain and that José Perez y Fernandez is indebted to the estate of the late Claudio Barro in the sum of $15000 pesos after allowing all just credits and set-offs for promissory notes made and signed and delivered by José Perez y Fernandez to the late Claudio Barro for full value received and that the said José Perez y Fernandez is about to so fraudulently conceal, dispose of or mortgage his property, so as to hinder or delay his creditors.

(Signed) JOSE ANTONIO FERNANDEZ.

Subscribed and sworn to before me this 8th day of January
16 A. D. 1900, at Mayaguez, P. R.

(Signed) ROBERT ALEXANDER,
Captain 14th Infantry, Clerk U. S. Provisional Court.
By RICARDO NADAL,
Deputy Clerk.

Endorsement: Affidavit. Jose Antonio Fernandez, for attachment on José Perez y Fernandez' property for $15000 pesos. Filed clerk's office U. S. provisional court, January 8th, 1900. (Signed) Robert Alexander captain 14th infantry, clerk of the court, by Ricardo Nadal deputy clerk.

U. S. district court for Porto Rico, December, 1901, term Mayaguez. Jose Perez y Fernandez *vs.* Jose Antonio F. y Perez. C. L. 70. Exhibit 3 for Plaintiff.

And afterwards, to wit, on the same day last aforesaid there was introduced as evidence by plaintiff herein in this cause, a certain Exhibit No. 4. which said exhibit is in the words and figures following, to wit:

The President of the United States of America to marshal of the United States provisional court for the department of Porto Rico, Greeting:

Whereas Jose Antonio Fernandez, power of attorney for Rafael Diaz Agueria has this day filed the necessary affidavit in an action on assumpsit, wherein he demands the sum of $5000.00 (five thousand dollars) to procure a writ of attachment against the lands and tenements, goods, chattels, and effects of José Perez y Fernandez which may be found in this department,

Therefore, you are hereby commanded to levy upon and take possession of the lands and tenements, goods, chattels and effects of José Perez y Fernandez not excepted from taxation which may be

found in the department of Porto Rico, or so much thereof as will satisfy the said claim of $5000.00 and the cost of this action
17 and make return of your doings hereon, on or before the 13th day of January A. D. 1900 and therein fail not.

Witness: George W. Davis, brigadier general, U. S. V. commanding the department aforesaid and the seal of this court at Mayaguez, P. R. this 2nd day of January A. D. 1900.

(Signed) ROBERT ALEXANDER,
[SEAL.] *Captain 14th Infantry, Clerk U. S. Provisional Court,*
By RICARDO NADAL,
Deputy Clerk.

Endorsement.

Marshal's Return.

Received this writ on the 2nd day of January 1900 and served the same on the 4th day of January 1900 by attaching the two story brick and stone house of No. 10 Peral street, Mayaguez and posting the notice thereof in conspicuous place, said property belonging to Jose Perez y Fernandez.

This at Mayaguez, P. R.

(Signed) S. C. BOTHWELL,
U. S. Marshal,
By WILHELM LUTZ,
Deputy Marshal.

Fees.

Service	$2.00
Posting notice	1.00

Filed clerk's office U. S. provisional court 4th of January 1900.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk of the Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

U. S. district court of Porto Rico, December term, 1901, Mayaguez. Jose Perez y Fernandez *vs.* Jose Antonio y Perez. C. L. 70. Exhibit 4 for Plaintiff.

And afterwards, to wit, on the same day last aforesaid, there was introduced as evidence by plaintiff herein a certain Exhibit No. 5, which said exhibit is in the words and figures following, to wit:

18 *Notice.*

To whom it may concern:

You are hereby notified that under and by virtue of a writ of attachment issued out of the U. S. provisional court for the department of Porto Rico, dated the 4th day of January A. D. 1900, in a suit pending in the said court in which Rafael Diaz Agueria is

plaintiff and José Perez y Fernandez, defendant, and to me directed and delivered, I have this day attached and levied upon certain real estate described as follows: One brick house situated on Feral street No. 10 in the city of Mayaguez, with its lot, bound on the right by Minerva street, on the left by the house of Manuel Pinillo, in rear by the property of Silvany Martinez and Carlos Cordero as the property of said defendant.

This notice is in compliance with the rule of said court requiring notice of such levy to be posted upon the property attached dated this 4th day of January A. D. 1900.

S. C. BOTHWELL,
Marshal U. S. Provisional Court for Dep. of P. R.,
(Signed) By WILHELM LUTS,
Deputy Marshal.

I, Samuel C. Bothwell marshal as aforesaid do hereby certify, that the aforegoing is a true copy of the notice of attachment signed by me according to rule 14 of the said court; and that said notice was duly posted by me in a conspicuous place upon the attached property on the 4th day of January A. D. 1900.

Witness my hand at Mayaguez, Puerto Rico, this 4th day of January A. D. 1900.

S. C. BOTHWELL,
Marshal U. S. Provisional Court for Dept. of P. R.
(Signed) By WILHELM LUTZ,
Deputy Marshal.

Endorsement: C. L. No. 11. Notice of attachment and certificate thereof filed Clerk's office U. S. provisional court 4th of January 1900 Robert Alexander captain 14th infantry, clerk of the court (Signed) by Ricardo Nadal, deputy clerk.

10 U. S. district court for Porto Rico, December 10th, 1901, Mayaguez. José Perez y Fernandez vs. Jose Antonio Fernandez y Perez. C. L. 70. Exhibit 5 for Plaintiff.

And afterwards, to wit, on the same day last aforesaid there was introduced as evidence by plaintiff herein a certain Exhibit No. 6, which said exhibit is in the words and figures following, to wit:

RAFAEL DIAZ AGUER-IA, Executor Last Will and Testament of Claudio Barro, Deceased,
vs.
JOSE PEREZ Y FERNANDEZ.

The President of the United States of America to marshal of said court, Greeting:

You are hereby commanded to summon José Perez y Fernandez, residing in Mayaguez to be and appear before the U. S. provisional court for the department of Puerto Rico at Mayaguez, P. R., on or before the 13th say of January A. D. 1900, then and there to answer in an action on assumpsit, damages $5000.00

Failing to so appear, judgment will be entered against the said José Perez y Fernandez, by default.

Witness: George W. Davis, brigadier general, U. S. V. commanding the department aforesaid, and the seal of this court, at Mayaguez, P. R. this 2nd day of January, A. D. 1900.

ROBERT ALEXANDER,
[SEAL.] *Captain 14th Infantry, Clerk U. S. Provisional Court.*
(Signed) By RICARDO NADAL,
Deputy Clerk.

Endorsement.

Marshal's Return.

Received this writ on the 10th day of January 1900 and served the same on the 10th day of January 1900 by delivering a true copy thereof to José Perez y Fernandez the within named person This at San Juan, P. R.

SAMUEL C. BOTHWELL,
U. S. Marshal, San Juan, P. R.
(Signed) JAMES LAWRENCE,
Deputy Marshal.

Service: Fees $2.00.

20 C. L. 11.

Summons filed clerk's office United States provisional court 13th January, 1900.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk of the Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

U. S. district court for Porto Rico December 1901, term Mayaguez. Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez. C. L. 70. Exhibit 6 for Plaintiff.

And afterwards, to wit, on the same day last aforesaid there was introduced as evidence a certain Exhibit No. 7 which said exhibit is in the words and figures following, to wit:

Rules United States Provisional Court, Department of Porto Rico, 1899.

Proceedings at law.

Rule 17. All suits of civil nature, other than those in equity and admiralty, shall be begun by summons which shall be issued by the clerk upon the precipe of the plaintiff's attorney requesting the same and shall be returnable on a day to be named therein, not less than ten nor more than fifteen days subsequent to the issuance thereof. But if service upon all the defendants has not been made ten days before the return day, the defendants shall have until ten days, after the date of the last service to enter their appearance in

the suit. If the defendants have not been served before the return day, alias summons shall be issued upon demand.

21 And afterwards, to wit, on the same day last aforesaid, the plaintiff by his attorney herein introduced as evidence a certain entry in the Mayaguez journal of this court which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

At a stated term of the district court of the United States of America, within and for the district of Porto Rico, began and had in the court rooms at the city of Mayaguez, P. R., in said district, on the first Monday of June, being the third day of that month, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America the one hundred and twenty-six.

Present: The Hon. William H. Holt, judge.

On Monday the third day of June, 1901, among the proceedings had were the following, to wit:

RAFAEL DIAZ AGUERIA } C. L. No. 10. Replevin.
vs.
JOSÉ PEREZ Y FERNANDEZ. }

RAFAEL DIAZ AGUERIA } C. L. No. 11. Assumpsit. Damages, $5,000.00.
vs.
JOSÉ PEREZ Y FERNANDEZ. }

The two above causes having been called, J. M. Keely, attorney for the defendant, moves the court to dismiss same, which is granted and both causes are ordered dismissed at plaintiff's cost.

And afterwards, to wit, on the same day last aforesaid the plaintiff by his attorney herein introduced as evidence a certain entry on the Mayaguez journal of this court for the June term 1901, which said entry is clothed in the words and figures following, to wit:

22 JACINTO PEREZ Y BARROS } Equity. No. 4.
vs.
RAFAEL DIAZ AGUERIA ET AL. }

Restraining order heretofore issued in the above entitled suit will be ordered permanent.

And afterwards, to wit, on the same day last aforesaid the plaintiff by attorney herein introduced as evidence a certain order entered on the Mayaguez journal of this court for the June term, 1901, which said order is clothed in the words and figures following, to wit:

On Tuesday the fourth day of June, 1901, among the proceedings had were the following, to wit:

JACINTO PEREZ BARROS vs. RAFAEL DIAZ AGUERIA and JOSE PEREZ Y FERNANDEZ.	Equity. No. 4. Injunction.

Order.

This is a bill by the complainant Jacinto Perez, as the heir of Claudio Barros to enjoyn the defendant, Rafael Diaz Agueria, who has sued as executor of said Barros, in the further prosecution of two actions at common law pending in this cause, upon or on account of notes executed by one Jose Perez y Fernandez, from paying said Agueria. The denial in the answer is not sufficient to put in issue the right of the complainant to sue; it merely states a legal conclusion. The case is now submitted upon exceptions to the answer for insufficiency. The bill avers that said executor had no power to sue in the United States provisional court for the department of Porto Rico and that therefore the prosecution of said ordinary actions should be enjoyned. It appears that the said Agueria is a foreign executor, at least, it is not claimed otherwise in the answer. He is named as executor in a will in Spain, and if he qualified as such there, yet, no ancillary testamentary letters have been taken out here, and it does not appear that he has been given the right in any way
23 to sue here. A grant of letters in one country does not at common law, authorize the personal representative to exercise any right over the decedent's property beyond the jurisdiction of the country where said letters were granted. There is no extra-territorial power. The representative can neither sue nor be sued out of the jurisdiction of the State from which he derives his authority and to which he is responsible. In order to reach property in another State and to collect debts belonging there to the estate, he must first obtain ancillary letters and comply with the requirements of that jurisdiction. This is the rule in the absence of any statutory provisions in the jurisdiction where the representative sues. (Halleck's Int. Law, page 167.) The exception, therefore, to the answer for insufficiency, is allowed.

Judgment.

It is now ordered that the order of this court, dated May 3rd, 1901, sustaining the exceptions to the answer, be entered on the journal in advance of this judgment and the defendant, Rafael Diaz Agueria, failing to plead further, and the cause now being submitted it is adjudged that the injunction herein be made perpetual and said Diaz Agueria is, as foreign executor, perpetually enjoyned from proceeding further, either in person, or by agent or attorney in the action set out in the pleading, and the complainant, Jacinto Perez y Barros, is adjudged his costs herein, to be taxed by the clerk and for which execution may issue if not paid.

And afterwards, to wit, on the same day last aforesaid there was introduced as evidence by the defendant herein a certain deed of mortgage, which said deed is in the words and figures following, to wit:

24 *Translation of Mortgage Deed.*

Don José Perez y Fernandez to the favor of Don Victor Ochoa y Perez. For Horton & Cornwell.

No. 973.

In the city of Mayaguez, the 10th day of November, 1899, before me Don Mariano Riera Palmer, lawyer, resident of Mayaguez and notary public of same and of the Illustrious College of Porto Rico, and witnesses at the end mentioned: Appear-: Don José Perez Fernandez, of age, married, merchant and resident of this city. I give credit to know him, his professon and residency, and assuring me to be enjoying his civil rights, and believing he has the necessary legal capacity to go into the execution of this deed of voluntary mortgage, he says

1st. That he is the owner of the following properties:

1st. A wall house measuring: 22 "varas" at the front, same being equivalent to 18 metres, 38 centimetres, 98 mil-imetres; and 10 "varas" at her length, same being equivalent to 8 metres, 35 centimetres, 90 millimetres; and a shed of all the length of the house, being 2 varas wide, same being equivalent to one metre, 75 centimetres and 18 millimetres. Said shed is annexed to the said house, and it and a lot, which equally belongs to him are situated in the "barrio" of the Marina Septentrional of this city. Said lot measures 22 "varas" at the front, which metrical equivalence, has been said; and 37 "varas" long, being equivalent to 30 metres, 92 centimetres, and 82 millimetres. Being bound: on the north by property which was of Don Honorato Hernandez; on the
25 south, the river; on the east, the street going to "La Puntilla" and whereby the said house has one of its fronts, and on the west by said river and the sea.

He owns said property because he bought it from Don Claudio Barro y Fernandez, as it is stated in a deed issued in "Santa Eulalia de Callato" (Concejo de Oviedo, Spain) the 25th of August, 1897, before notary of said town Don Cipriano A. Pedrosa, a first copy of which is showed to me for this contract; and which appears recorded at the register of property at folio 250, volume 36 of this city, property No. 869, duplicate, 4th inscription; this property being free from responsibilities or obligations.

2nd. One parcel of land with a superficial extension of 50 cuerdas which are equivalent to 19 hectares, 65 ares, 19 centares which are dedicated to the planting of coffee, bananas, and pasture, and situated in the barrio of "Bucarabones" of the municipality of "Las Marias"; an wooden house, roofed with garvanized iron, low by its front and there being in front of her a decorticating mill for coffee

with an wooden kitchen covered with zinc; a small house with a grinding mill, for coffee, moved by water; a water tank for washing said fruit; three esplanades for drying it, and two small wooden houses, covered with zinc. Said parcel of land is bound: on the north, by lands the property of Don Emilio Gomez and Don Martin Gaud; on the west by the River Grande; on the south, by lands the property of Don Felix Monsegur; and on the east, by the coffee plantation of Don Bernardo Gaud.—And another parcel of land, situated in the "barrio" before named "Jurnia" and now "Palma Escrita," municipality of "Las Marias." Said parcel of land has an extension of about 35 cuerdas, which are equivalent to 13 hectareas, 78 ares, and 69 centares; being bound, on the south by property which was, before, of Mr. Carlos Gaud, and Jose Laplaza's wife, and then from a straight line, to a "tartago," on top of a hill, then in a
western direction with same boundery and land of the plan-
26 tation of Don José Sabater and of Señor Delgado, to a "balla"
in a straight line to a "Tártago," before a high palm limiting with lands the property of heirs of Monsegur to a "laurel" at the shores of the River "Grande;" then following the river's shores to a "Higuerillo" the place by which it was begun.

The two rustic properties, above described were adquired by him by buying them from Doña Jovita Denizar, according to a deed issued before me on the 17th of February 1897: a first copy of which is showed to me for this contract, which does not appear to be recorded in the register of property.

3rd. One rustic property or parcel of land, being planted in coffee, bananas, pasture and brambles and briers; consisting of about 14 "cuerdas:" being equivalent to 5 hectares, 50 ares, 25 centares and 4 mil-iares in the barrio of "Bucarabones" (before named Furnias), site called Palma Escrita, municipal district of "Las Marias," judicial district of this city. Said parcel of property, is bound on the south by lands, before, the property of Don Carlos Gaud, and now of Don Juan Aguas-vivas; on the east, by land the property of José Laplaza; on the north by other lands, the property of Justo Gaud, and on the west by the river called "Guabas." Besides this it is surveyed: Beginning on the east; from "Tartago," from here and on the same direction to the north, to another "Tartago." From there, towards the west, with turns and returnings, till a "roble" tree, at the shores of the River "Guabas," from here upwards the river, to a "coyor" palm, and from here in a straight line to the spot wherefrom it was begun.

He acquired the said property by buying it from Don Gerardo Gonzalez according to a deed issued before Don Juan Z. Rodriguez, who was a notary in this city, on the 5th of February 1897, which first copy is showed to me for this cobtract, and which does not appear recorded in the register of the property.

4th. A wooden house, covered with roof-tile on Minerva street of this city, being marked No. 6, and on lot one which is built and all
its dependencies. Measuring 12 metres, 75 centimetres at the
27 front and 13 metres and 80 centimetres at sides; being bound, entering by the right hand side, by house the property of Don

Jaime Busquet; entering by the left hand side, by another house the property of heirs of Don Valentin Torrens and on its back with that of Maria Garcia, the front being on the north; it is bound on that side by said Minerva street.

The appearer acquired this property by buying it from Don Salvador Mestre, according to document issued before me, on the 30th of December 1892, a first copy of which, is shown to me for this act, and appears recorded in the register of property at folio 136, volium- 25 of this city, property No. 1567, inscription 2nd. Said house does not exist now because it has been destroyed.

5th. A brich house covered with roof-titles, with all its dependencies on Carcel street, now named "Peral" street, where the front of said house is and which it limits on the west, making a corner with Minerva street, both of this city and whereby it has its wooden balcony, being marked No. 10. Measuring by the front 17 metres and 48 centimetres; by its right hand side, that is, by the north and by Minerva street 5 metres 64 centimetres; by the left, that is by the south whereby it is bound by a house the property of Don Miguel Pinillos, 8 metres and 75 centimetres and by its back that is by the east whereby it is limited by a house the property of Silvain Martinez and Carlos Cordero, 17 metres, 82 centimetres. It is built on a lot of same dimensions which also belongs to him.

He owns said property because he bought it from Doña Julia Bernard, according to a deed consented before me on the 12th of January 1893 and first copy of it, is shown to me for this act and appears recorded in the register of property, at folio 103, over, volume the 3rd. of this city, property No. 173, inscription 5th.

Said house does not exist because it has been destroyed.

6th. A wooden house (half high) roof-tile covered qith a balcony at the front, on Sol street of this city, having the front on the
28 south with its kitchen and dependencies. Being bound on its right side that is on the east, by a house the property of heirs of Simon Madera; on the left side, that is on the west, by a house the property of Don Manuel Pinillo; and on the back that is on the north by another house the property of Silvain Martinez, being marked with No. 26. Being 10 varas long at the front, same being equivalent to 8 metres, 35 centimetres, 90 millimetres, and 9 "varas" long at the sides being equivalent to 7 metres, 52 centimetres, 31 millimetres.

It is built on a lot that also belongs to him, same being 13 varas long at the front, which are equivalent to 10 metres, 36 centimetres, 67 millimetres and 18 "varas" long at sides, being equivalent to 15 metres, 4 centimetres, 62 millimetres. Said property belongs to him by buying it from Doña Maria y Doña Antonia Garcia, according to deeds consented before the notary of the capital of this island, Lawyer Don José Agustin de la Torre on the 10th of May 1894 and on the 22nd of May, 1899 before the notary of Habana, Don Francisco de Castro y Vasquez, which first copies are shown to me for this act and are recorded at the register of property. The described house does not exist because it has been destroyed by fire.

Grooping of properties.

Second. That the lots described under numbers 4, 5 and 6 actually form one sole property, and which he hereby groups, so that they may be recorded at the register of property as one sole property, and under one sole number for all of them. And the result of said grouping is as follows:

A lot having one front at Peral street, whereby it is bound on the west; measuring 17 metres, 48 centimetres; on the north, by Minerva street whereby it measures 18 metres, 39 centimetres; it is bound on the east by a house of Lawyer Don Francisco Pellegri and lot of Don Eusebio Biron, whereby it measures 28 metres, 84 centimetres and on the south by Sol street and house the property of heirs of Pinillo whereby it measures 10 metres, 86 centimetres, 67
29 millimetres on which lot exists a brick house two story high: the second floor of which is devoted to residence, and the first to stores; and same being covered with zinc having a balcony on the side of Peral street and a small brick balcony at the side of Minerva street with no number and same measures 17 metres and 48 centimetres, at the front and 18 metres, 35 centimetres long at sides.

Confession of debt.

Third. Appearer, Sr. Perez y Fernandez and acknowledges to owe to Don Victor Ochoa y Perez, of age, widower, merchant, resident in Asturias, and of the vicinity of the capital of this island, the sum of ($20,000.00) twenty thousand pesos, Porto Rican currency, which said gentleman has given him for different purposes.

Payment.

Fourth. That he obliges himself to pay to his creditor Sr. Ochoa the said twenty thousand dollars ($20000.00) which he debits him within the time of five years, counted from this date without premium or interest.

Mortgage.

Fifth. To guarantee the aforesaid obligation the debtor Sr. Perez Fernandez specially mortgages in favor of creditor Don Victor Ochoa y Perez, the properties described under Nos. 1, 2, and 3 and the grouping of the ones under No. 4, 5 and 6 with house, and the rest which constitutes it. Said properties stay with said obligation until all debt should be paid.

Sixth. According to what it is provided by the mortgage law (Ley Hipotecaria) the grantor distributes the capital of said obligation in the following way:

The house described in the first place will be responsible for three thousand dollars ($3000.00) of capital.

The property of fifty (50) cuerdas described in the second place will be responsible for one thousand and five hundred dol-
30 lars ($1500.) of capital.

The one of 35 cuerdas will be responsible for one thousand

and five hundred dollars ($1500.00) of capital. The one described under No. 3 (three) of about fourteen (14) cuerdas will answer for two thousand dollars of the capital.

And the property formed by grouping made in the second clause will answer for twelve thousand ($12000) dollars of the amount of debt.

Valuation.

Seventh. According to what is provided by paragraph 137 of the moertgage law, the appearer assesses the mortgaged property, renouncing to all new valuations or action with this purpose in the following way:

The first in the sum of three thousand dollars ($3000.00) of currency.

The second, of fifty cuerdas in the sum of five thousand dollars ($5000.00).

The third of thirty five cuerdas in the sum of three thousand dollars ($3000.00).

The one described under numbre three of fourteen cuerdas in the sum of three thousand dollars ($3000.00).

The one resulting from the grouping before made in the sum of fourteen thousand dollars ($14000.00).

Notifications.

I the notary notified them of: That confessed, as it is, the debt, there is no place for any exception of it not being true, therefore the properties mortgaged by this deed, are obliged to the responsibility of the same, though it should be proved afterwards that it was not received in all or in part.

That the preferred legal mortgage, which the province and municipalities of this city and Las Marias, have any other creditor for the collection of last annualty of taxes not satisfied by
31 the mortgaged properties, is in favor of the said province and municipalities.

That this deed must be recorded at the register of property of this city and that without said requisite it will not prejudice a third person nor will it be admissible by any court, council or office of the government, so it is consented to and signed, with the witnesses by Don Jose Carmona and Don Luis M. Cardona residents in this city; previous reading that in only one act I did to all and advised them of the right granted to them by law, to read it by themselves, of what I give credit.

JOSE PEREZ FERNANDEZ.

Signed MARIANO RIERA PALMER, *Lawyer.*

JOSE CARDONA.

LUIS M. CARDONA.

It corresponds faithfully with the original deed which under number firstly said (973) is filed in the protocol of this notary, in

my charge. Crediting it and being asked for by Señor Don José Fernandez I issue this first copy in eight sheets of paper.

Mayaguez, November 20th, 1901.

(Signed) MARIANO RIERA PALMER, *Lawyer.*

The foregoing is a true and faithful translation of its original.

(Signed) Z. VALS SPINOSA,
Interpreter, United States District Court, Porto Rico.

Endorsement: C. L. 70. U. S. district court for Porto Rico. Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez Translation Exhibit "A" by defendant. Trial Dec. 11, 1901. Dec. 12, 1901. Mayaguez. Filed clerk's office. United States district court Dec. 12, 1901 (Signed) Ricardo Nadal clerk of the court.

32 And afterwards, to wit, on the 12th day of December A. D. 1901 an entry was made upon *de* journal of said court in the said case, which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

Resumed.

Now comes the attorneys for the defendants herein and present a motion to non suit which is overruled. Whereupon the attorneys for the defendants enter an exception to the ruling of the court. Thereupon the jury hears the evidence and arguments of counsel.

And afterwards, to wit, on the same day last aforesaid an entry was made on the journal of said court in the said cause, which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

Resumed.

The jury having heard the instructions of the court upon the law in the case retires.

And afterwards, to wit, on the same day last aforesaid an entry was made upon the journal of the said court in the said cause, which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

Now comes the jury in the above entitled cause and returns the following verdict:

"We, the jury, find for the plaintiff seven thousand dollars ($7000.00) in damages.

J. J. JIMENEZ, *Foreman.*

Mayaguez, December 12th, 1901."

33 And afterwards, to wit, on the same day last aforesaid came the defendant in this cause by his attorneys and filed in the clerk's office of the court aforesaid his certain motion in this case, which said motion is clothed in the words and figures following, to wit:

District Court of the United States in and for the District of Porto Rico.

JOSE PEREZ Y FERNANDEZ, Plaintiff,
versus
JOSE ANTONIO FERNANDEZ Y PEREZ, RAFAEL DIAZ AGUERRIA, Defendants.

Motion for a New Trial.

Now comes the defendant Jose Antonio Fernandez y Perez, by his attorneys Horton and Cornwell and moves the court to vacate the verdict found by the jury in this action on the 12th day of December A. D., 1901, and to grant to said defendant, Jose Antonio Fernandez a new trial for the following causes, to wit,

Because the amount of damages assessed by the jury in their verdict was excessive and too large and not warranted by the evidence

Because the verdict of the jury is contrary to law.

Because the court erred in instructing the jury as to the law in the case.

Because the verdict of the jury has no evidence to support it and is so far contrary to the evidence — to shock the moral sense.

(Signed) HORTON AND CORNWELL,
Attorneys for the Defendant Jose Antonio Fernandez.

(Indorsement of motion:) Common law, 70, Jose Perez y Fernandez *versus* Jose Antonio Fernandez and Rafael Diaz Aguerria. Motion for a new trial of defendant, Jose Antonio Fernandez Filed, clerk's office, United States district court. Dec. 12, 1901, Ricardo Nadal, clerk of the court.

And afterwards, to wit, on the same day last aforesaid, an entry was made on the journal of the said court in said cause, which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs. } C. L. 70.
FERNANDEZ Y PEREZ.

Now come the attorneys for the defendant in this cause and present a motion for a new trial, which motion, upon hearing the counsel of both parties, is overruled.

Whereupon the attorneys for the defendant except from the ruling of the court and are given till the 14th of January, 1902, to file a bill of exceptions.

And afterwards, to wit, on the same day last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

PEREZ Y FERNANDEZ
vs. } C. L. 70.
FERNANDEZ Y PEREZ.

Judgment.

On this 12th day of December, 1901, this cause being called for trial and both parties appearing and after hearing the evi-
34 dence and the arguments of counsel, it is submitted to the jury under the instructions of the court.

Thereupon the jury retired and after due deliberation returned the following verdict,

"We, the jury, find for the plaintiff seven thousand dollars ($7,000.00) in damages.

J. J. JIMENEZ, *Foreman.*"

Whereupon and on this same day the defendant files his motion for a new trial for grounds therein set forth, and after hearing the argument of counsel the said motion is by the court overruled.

Wherefore it is ordered and adjudged that plaintiff Jose Perez y Fernandez have and recover of Jose Fernandez y Perez the said sum of seven thousand dollars damages and his costs herein expended for which he shall have execution.

And upon request of defendant he is allowed until January 15, 1902, to present and file his bill of exceptions herein.

And afterwards, to wit, on the 13th day of January, A. D. 1902, came plaintiff and defendant in this case by their respective attorneys and filed in the clerk's office of the court aforesaid their certain agreement in this case, which said agreement is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE FERNANDEZ Y PEREZ.

Agreement Extending Time to File Bill of Exceptions.

It is hereby agreed between the parties hereto that defendant Jose Fernandez y Perez may file and present his bill of exceptions to the court not later than February 1st, 1902.

(Signed) HORTON AND CORNWELL,
Attorneys for Jose Fernandez y Perez.

(Signed) F. H. DEXTER,
Attorney for Plaintiff.

(Indorsement:) C. L. Mayaguez. Jose Perez y Fernandez *vs.* Jose Fernandez y Perez. Agreement extending time to file bill of exceptions. Filed clerk's office United States district court. (Signed) Ricardo Nadal by A. Aguayo, clerk of court. January 13, 1902.

And afterwards, to wit on the same day last aforesaid there was an order entered upon the chancery order book of said court in said cause which said order is clothed in the words and figures following, to wit:

35 In the District Court of the United States for Porto Rico, January 13, 1902.

Present: The Honorable Wm. H. Holt, judge.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE FERNANDEZ Y PEREZ.

Order.

A stipulation having been filed herein and the parties agreeing thereto, it is hereby ordered that defendant's time for filing bill of exceptions be extended until February 1st, 1902, and it is hereby further ordered that but not by consent that the amount of the defendant's supersedeas bond be fixed at ten thousand dollars.

January 13th, 1902.

(Signed) WM. H. HOLT, *Judge.*

And afterwards, to wit on the 29th day of January, 1902, came plaintiff and defendant herein by their attorneys and filed in the clerk's office of the court aforesaid their certain stipulation which said stipulation is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ.

Stipulation.

It is hereby agreed — counsel in the above entitled cause that defendant shall have until February 5, 1900, to file his bill of exceptions.

(Signed) F. H. DEXTER,
Attorney for Plaintiff.

(Signed) HORTON AND CORNWELL,
Attorneys for Defendant.

(Indorsement:) Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez. Stipulation extending time for defendant to file bill of exceptions to February 5, 1902. Filed clerk's office United States district court Jan. 29. 1902. Ricardo Nadal, clerk of the court. By H. H. Scoville, D. C.

And afterwards, to wit, on the same day last aforesaid there was entered an order in the chancery order book of said court, which order is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, January 29, 1902.

Present: The Honorable Wm. H. Holt, judge.

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ. } C. L. 70.

36 Now came the parties and filed stipulation extending time to file bill of exceptions until Febryary 5th, 1902, and it is so ordered.

(Signed) WM. H. HOLT, *Judge.*

And afterwards, to wit, on the first day of February, A. D. 1902, came the plaintiff, and filed in the clerk's office of the court aforesaid, his certain assignment of judgment in this case, which said assignment of judgment is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JOSÉ ANTONIO PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.

Assignment of Judgment.

In consideration of the sum of two thousand dollars heretofore received by me from Don José B. Gonzalez, of San Juan, Porto Rico, and of the further sum of five thousand dollars to me paid and delivered at the time of this agreement, I hereby, sell, assign and transfer to the said José B. Gonzalez, for his use and benefit the judgment obtained by me in the above entitled cause in the district court of the United States for Porto Rico at a session thereof held on the twelfth day of December, 1901, in the city of Mayaguez.

And I hereby authorize the said José B. Gonzalez to collect and enforce the payment of the said judgment in my name by execution or otherwise and to take such steps in the said district court of the United States, or any other court, as may be necessary to collect the same. It is understood, however, that the said judgment is hereby assigned subject to the prior lien and claim of F. H. Dexter, attorney at law, for his services, in connection with the recovery thereof, of which the said José B. Gonzalez has notice.

Signed in duplicate this February 1st, 1902.

(Signed) JOSÉ PEREZ.

Be it known that on this first day of February, 1902, before me personally appeared José Perez y Fernandez, to me personally known, who acknowledged the execution of the foregoing instrument as his free act and deed.

(Signed) RICARDO NADAL,
[SEAL.] *Clerk U. S. District Court of Porto Rico.*

Indorsement: C. L. 70, Mayaguez. Fernandez vs. Perez. Assignment of judgment. Filed, Clerk's office, United States district court, February 1st, 1902. (Signed) Ricardo Nadal, clerk of court.

And afterwards, to wit, on the 5th day of February, 1902, an order was entered upon the chancery order *order* book of the said court in said cause, which said order is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico, February 5th, 1902.

Present: The Hon. Wm. H. Holt, judge.

PEREZ Y FERNANDEZ
vs.
FERNANDEZ Y PEREZ and RAFAEL DIAZ AGUERRIA.

Order.

The bill of exceptions heretofore tendered herein is now signed, sealed, approved filed and enrolled, but not to be copied upon the record, to have the same effect as if it had been approved and filed in open court at the December term, 1901, of the court at Mayaguez.

37 And afterwards, to wit, on the same day last aforesaid, there was filed in the clerk's office of this court in this case, by defendant through his attorneys herein, a certain bill of exceptions, which said bill of exceptions is in words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.
} Bill of Exceptions.

Be it remembered that at a term of the district court of the United States for Porto Rico, held in the city of Mayaguez on the 11th day of December A. D. 1901, a cause therein pending wherein Jose Perez y Fernandez was plaintiff and Jose Antonio Fernandez y Perez, and Rafael Diaz Aguerria, were defendants, came on to be heard before the Hon. Wm. H. Holt, judge of the said court, at which time came the said parties, by their respective attorneys, and thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid whereof mention is within made, being called likewise came and were sworn to try said issues upon the merits of said cause in manner aforesaid joined.

And thereupon the plaintiff, José Perez y Fernandez to maintain the issues on his part, offered and introduced in evidence a certain document entitled as the declaration in a certain cause between said Rafael Diaz Aguerria, executor of the last will and testament of Claudio Barros, as plaintiff, against the said José Perez y Fernandez, as defendant, filed on the 2nd day of January, 1900, in a cause then pending in the United States provisional court for the department of Porto Rico in the cause aforesaid, which document was in words and figures following to wit:

Copy of Exhibit 1 for the Plaintiff.

In the United States Provisional Court for the Department of Puerto Rico.

Declaration.

Rafael Diaz Aguerria, Executor Last Will and Testament — Claudio Barro, vs. José Perez y Fernandez.	Assumpsit. Damages, $5,000.00.

Rafael Diaz Aguerria, citizen of Spain, plaintiff, executor of last will and testament of Claudio Barro, citizen of Spain, deceased, complains of José Perez y Fernandez, defendant of a plea of trespass on the case on promises.

For that, whereas, in the life time of the said Claudio Barro, on the 27th day of August, in the year 1897, in the city of Colloto, province of Oviedo, Spain, the defendant made his promissory note and delivered the same to the said Claudio Barro, thereby then and there promised to pay on the 31st day of December, A. D. 1897, the sum of $1000.00; thereby then and there promissed to pay on the 31st day of December A. D. 1898, the sum of $1420.00 pesos; thereby then and there promissed to pay on the 31st day of December A. D.
1899 the sum of $1360.00 pesos, in the city of Mayaguez,
38 Puerto Rico, for value received, by means whereof the defendant then and there at the time and place first aforesaid became liable to pay to the said Claudio Barro the said sums of money in the said promissory note specified according to the tenor and effect of the said note. For money before that time lent by Claudio Barro to the defendant at his request; for money before that time paid out and expended by Claudio Barro for the use of the defendant at his request; for goods, chattels and effects before that time sold and delivered by Claudio Barro to the defendant at his request. Yet, although the aforesaid day of payments in the said note has elapsed the defendant has not paid any of the aforesaid amounts of said note or any part of them either to the said Claudio Barro in his life time or to the plaintiff since the death of the said Claudio Barro, nor has the defendant, though thereto requested paid the several other sums of money above specified or any or either of them or any part thereof either to the said Claudio Barro in his life time or to the plaintiff since the death of the said Claudio Barro, but to pay the same the defendant refuses to the damage of the plaintiff as executor aforesaid of $5000.00 and therefore he brings his suit.

(Signed) HORTON & CORNWELL,
Attorneys for Plaintiff.

Filed, clerk's office United States provisional court January 2nd 1900.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk of the Court,
By RICARDO NADAL,
Deputy Clerk.

And thereupon said plaintiff further to maintain the issues on his part offered and introduced in evidence another document entitled as an affidavit in attachment filed on the same day and in the same cause and court last aforesaid, which document was in words and figures following, to wit:

COPY OF EXHIBIT 2 FOR PLAINTIFF.

In the United States Provisional Court for the Department of Porto Rico.

Affidavit of Attachment.

José Antonio Fernandez makes oath and says he is power of attorney of Rafael Diaz Agueria, and that Rafael Diaz Agueria is the executor of the last will and testament of Claudio Barro, and that Rafael Diaz Agueria has a good cause of action therein, and that affiant has reason to believe that the defendant intends to and will fraudulently part with or conceal his property before judgment can be recovered against him, so that said judgment cannot be satisfied out of said property.

(Signed) JOSÉ ANTONIO FERNANDEZ.

Subscribed and sworn to before me this second day of January A. D. 1900 at Mayaguez, P. R.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk U. S. Prov. Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

39 Filed in the clerk's office United States provisional court January 2nd, 1900.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk of the Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

And thereupon said plaintiff further to maintain the issues on his part, offered and introduced in evidence another document entitled as an additional affidavit in attachment filed in the same cause and court last aforesaid on the 8th day of January, A. D. 1900, which document was in words and figures as follows, to wit:

COPY OF EXHIBIT 3 FOR THE PLAINTIFF.

In the United States Provisional Court for the Department of Puerto Rico.

RAFAEL DIAZ AGUERIA
vs.
JOSE PEREZ Y FERNANDEZ. } Affidavit for Attachment.

José Antonio Fernandez makes oath and says — power of attorney — Rafael Diaz Agueria, and that Rafael Diaz Agueria, citizen of Spain, residing in Spain, is executor of last will and testament of Claudio Barro, deceased, who was a citizen of Spain and that José Perez y Fernandez is indebted to the estate of the late Claudio Barro in the sum of $15,000.00 pesos, after allowing all just credits and set-offs, for promissory notes made and signed and delivered by José Perez y Fernandez to the late Claudio Barro for full value received and that the said José Perez y Fernandez is about to fraudulently conceal, dispose of or mortgage his property so as to hinder or delay his creditors.

(Signed) JOSÉ ANTONIO FERNANDEZ.

Subscribed and sworn to before me this eighth day of January A. D. 1900, at Mayaguez, P. R.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk U. S. Provisional Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

And thereupon said plaintiff further to maintain the issues on his part offered and introduced in evidence another document entitled as a writ of attachment, filed in the same cause and court last aforesaid, with the return of the marshal of the said court thereon on the 4th day of January, 1900, which document was in words and figures following, to wit:

40 COPY OF EXHIBIT 4 FOR PLAINTIFF.

The President of the United States of America to marshal of the United States provisional court for the department of Puerto Rico, Greeting:

Whereas, José Antonio Fernandez, power of attorney for Rafael Diaz Agueria, has this day filed the necessary affidavit in an action on assumpsit, wherein he demands the sum of $5000.00 (five thousand dollars) to procure a writ of attachment, against the lands and tenements, goods, chattels and effects of José Perez y Fernandez, which may be found in this department.

Therefore, you are hereby commanded to levy upon and take possession of the lands and tenements, goods, chattels and effects of

José Perez y Fernandez, not exempt from taxation, which may be found within the department of Puerto Rico, or so much thereof as will satisfy the said claim of $5000.00 (five thousand dollars) and the costs of this action, and make return of your doing hereon on or before the 13th day of January, A. D. 1900, and therein fail not.

Witness: George W. Davis, brigadier general U. S. V. commanding the department aforesaid, and the seal of this court at Mayaguez, P. R. this second day of January, A. D. 1900.

[SEAL.] ROBERT ALEXANDER,
Capt. 14th Inf., Clerk U. S. Provisional Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

(*Marshal's Return.*)

Received this writ on the 2nd day of January, 1900, and served the same on the 4th day of January, 1900, by attaching the two story brick and store house of No. 10 Peral street, Mayaguez, and posting the notice thereof in conspicuous place, said property belonging to José Perez y Fernandez. This at Mayaguez, P. R.

S. C. BOTHWELL,
U. S. Marshal,
(Signed) By WILHELM LUTZ,
Deputy Marshal.

Fees.

Service	$2.00
Posting notice	1.00

Filed clerk's office, U. S. provisional court 4th of January 1900.

ROBERT ALEXANDER,
Capt. 14th Infantry, Clerk of the Court.
(Signed) By RICARDO NADAL,
Deputy Clerk.

And thereupon said plaintiff, further to maintain the issues on his part, offered and introduced in evidence another document entitled "Notice of attachment," filed in the same cause and court last aforesaid on said 4th day of January, 1900, which document was in words and figures following, to wit:

41 COPY OF EXHIBIT 5 FOR PLAINTIFF.

Notice.

To whom it may concern:

You are hereby notified that under and by virtue of a writ of attachment issued out of the U. S. provisional court for the department of Puerto Rico, dated the 4th day of January, A. D. 1900, in a suit pending in the said court in which Rafael Diaz Aguerria is plaintiff, and José Perez y Fernandez defendant, and to me directed

and delivered, I have this day attached and levied upon certain real-estate described as follows:

One brick house situated on Peral street, number 10, in the city of Mayaguez, with its lots, bounded on the right by Minerva street, on the left by the house of Manuel Pinillo, in rear by the property of Silvani Martinez, and Carlos Cordero, as the property of said defendant.

This notice is in compliance with the rule of said court requiring notice of such levy to be posted upon the property attached.

Dated this 4th day of January, A. D. 1900.

S. C. BOTHWELL,
Marshal U. S. Prov. Court for the Dept. of P. R.,
(Signed) By WILHELM LUTZ,
Deputy Marshal.

I, Samuel C. Bothwell, marshal as aforesaid, do hereby certify that the foregoing is a true copy of the notice of attachment signed by me according to rule 14 of the said court, and that said notice was duly posted by me in a conspicuous place upon the attached property on the 4th day of January A. D. 1900.

Witness my hand at Mayaguez, Puerto Rico, this fourth day of January, A. D. 1900.

S. C. BOTHWELL,
Marshal U. S. Prov. Court for Dept. of P. R.,
(Signed) By WILHELM LUTZ,
Deputy Marshal.

And thereupon said plaintiff further to maintain the issues on his part offered and introduced in evidence another document, entitled "Summons," filed in the said cause and court last aforesaid, with the return of the marshal of the said court thereon on the 13th day of January, 1900, which document was in words and figures following to wit:

COPY OF EXHIBIT 6 FOR PLAINTIFF.

RAFAEL DIAZ AGUERRIA, Executor Last Will and Testament of Claudio Barro, Deceased,
vs.
JOSE PEREZ Y FERNANDEZ.

42 The President of the United States of America to marshal of said court, Greeting:

You are hereby commanded to summon José Perez y Fernandez, residing in Mayaguez, to be and appear before the United States provisional court for the department of Puerto Rico, at Mayaguez, P. R. on or before the 13th day of January, A. D. 1900, then and there to answer in an action of assumpsit, damages $5000.00.

Failing to so appear judgment may be entered against the said José Perez y Fernandez, by default:

Witness: George W. Davis, brigadier general U. S. V., commanding the department aforesaid, and the seal of this court at Mayaguez, P. R. this second day of January, A. D. 1900.

ROBERT ALEXANDER,
Captain 14th Infantry, Clerk U. S. Provisional Court,
(Signed) By RICARDO NADAL,
[SEAL.] *Deputy Clerk.*

(*Marshal's Return.*)

Received this writ on the 10th day of January, 1900, and served the same on the 10th day of January, 1900, by delivering a true copy thereof to José Perez y Fernandez, the within named person. This at San Juan, P. R.

(Signed) SAMUEL C. BOTHWELL,
U. S. Marshal, San Juan, P. R.,
(Signed) By JAMES LAWRENCE,
Deputy Marshal.

Service fees $2.00

Filed: Clerk's office, United States provisional court, 13th of January, 1900.

ROBERT ALEXANDER,
Capt. 14th Inf., Clerk of the Court,
(Signed) By RICARDO NADAL,
Deputy Clerk.

And thereupon said plaintiff, further to maintain the issues on his part, offered and introduced as evidence rule No. 17 of the said United States provisional court for the department of Puerto Rico aforesaid, and which said rule was in words and figures as follows, to wit:

COPY OF EXHIBIT 7 FOR PLAINTIFF.

Proceedings at Law.

Rule No. 17 (of the U. S. provisional court for the dept. of Puerto Rico).

All suits of civil nature, other than those in equity and admiralty, shall be begun by summons which shall be issued by the clerk upon the præcipe of the plaintiff's attorney requesting the same and shall be returnable on a day to be named therein not less than ten nor more than fifteen days subsequent to the issuance thereof. But if service upon all the defendants has not been made ten days
43 before the return day, the defendants shall have until ten days after the date of the last service to enter their appearance in the suit. If the defendants have not been served before the return day, alias summons shall be issued upon demand.

And thereupon said plaintiff further to maintain the issues on his part offered and introduced in evidence that part of the record or proceeding in the said United States district court for Porto Rico at the June term thereof, A. D. 1901, held in said city of Mayaguez, entered on page 138 of said record, and referring to the cause aforesaid, which said entry was in words and figures following to wit:

COPY OF EXHIBIT 8 FOR PLAINTIFF.

RAFAEL DIAZ AGUERRIA
vs.
JOSE PEREZ Y FERNANDEZ. } Com. L. No. 11. Assumpsit, $5,000.00.

The two above causes having been called, J. M. Keedy, attorney for the defendant moves the court to dismiss the same, which is granted and both causes are ordered dismissed at plaintiffs' costs.

And further to maintain said issues, said plaintiff offered and introduced in evidence another portion of said record of proceedings in the court last aforesaid at the term last aforesaid in a certain cause in chancery then pending in said court wherein Jacinto Perez y Barros was complainant and said Rafael Diaz Agueria and others were defendants, which entry is contained on page 144 of said record and was in words and figures following, to wit:

JACINTO PEREZ Y BARROS
vs.
RAFAEL DIAZ AGUERRIA ET AL. } Eq. 4.

Restraining order heretofore issued in the above entitled cause will be ordered permanent.

And further to maintain said issues, said plaintiff offered and introduced in evidence another portion of said record of proceedings in the court last aforesaid, at the term last aforesaid, and in the cause last aforesaid, which said entry is contained on page 146 of the record aforesaid, and is in words and figures following, to wit:

COPY OF EXHIBIT 10 FOR PLAINTIFF.

JACINTO PEREZ Y BARROS
vs.
RAFAEL DIAZ AGUERRIA and JOSÉ PEREZ y Fernandez. } Equity. 4. Injunction.

Order.

This is a bill by the complainant, Jacinto Perez, as the heir of Claudio Barros, to enjoin the defendant, Rafael Diaz Aguerria, who has sued as executor of said Barros, in the further prosecution of two

actions at common law pending in this court, upon or on account of notes executed by one, José Perez y Fernandez, from paying to
44 said Aguerria. The denial in answer is not sufficient to put in issue the right of the complainant to sue. It merely states a legal conclusion. The case is now submitted upon exceptions to the answer for insufficiency. The bill avers that said executor had no power to sue in the United States provisional court for the department of Puerto Rico and that therefore the prosecution of said ordinary actions should be enjoined. It appears that the said Aguerria is a foreign executor, at least, it is not claimed otherwise in the answer. He is named as executor in a will in Spain, and if he qualified as such there, yet, no ancillary testamentary letters have been taken out here, and it does not appear that he has been given the right in any way to sue here. A grant of letters in one country does not, at common law, authorize the personal representative to excercise any right over the decedent's property beyond the jurisdiction of the country where said letters were granted. There is no extra-territorial power. The representative can neither sue nor be sued out of the jurisdiction of the State from which he derives his authority and to which he is responsible. In order to reach property in another State, and to collect debts belonging there to the estate, he must first obtain ancillary letters and comply with the requirements of that jurisdiction. This is the rule in the absence of any statutory provision in the jurisdiction where the representative sues. (Halleck's Int. Law, page 167.) The exception, therefore, to the answer for insufficiency, is allowed.

Judgement.

It is now ordered that the order of this court, dated May 3rd, 1901, sustaining the exceptions to the answer, be entered on the journal in advance of this judgment, and the defendant, Rafael Diaz Aguerria, failing to plead further, and the cause now being *now* submitted, it is adjudged that the injunction herein be made perpetual and said Diaz Aguerria is, as foreign executor perpetually enjoined from proceeding further either in person, or by agent or attorney in the action set *put* in the pleadings, and the complainant, Jacinto Perez y Barros, is adjudged his costs herein, to be taxed by the clerk and for which execution may issue if not paid.

And thereupon further to maintain said issues, said plaintiff being produced as a witness and having first been duly sworn*ed*, testified as follows:

By Mr. DEXTER:

Q. Please state your name?
Ans. José Perez y Fernandez.
Q. Where do you reside?
Ans. In Mayaguez.
Q. How long have you lived in Mayaguez?
Ans. Seventeen years.

Q. How long have you lived in Porto Rico?
Ans. 23 years.
Q. What is your occupation at the present time?
Ans. I am a merchant.
Q. What was your business on January 2nd. 1900?
Ans. I was merchant and active partner of the house of Perez, Ramos y Cia.
Q. Did you owe any money at that time to one Claudio Barro?
—. Yes.
Q. Had you refused to pay to him or to his lawful representative?
Ans. No, sir; never; never.
Q. What amount of money was that that you owed on the 2nd day of January 1900 to Claudio Barro?
Ans. I think I owed about $6000. six thousand pesos provincial currency.
Q. Was Claudio Barros alive or dead on the 2nd day of January 1900?
Ans. He had died on December 23rd 1898.
Q. Where did he die?
Ans. In the province of Oviedo, in Spain.
Q. State what demand, if any, had been made upon you
45 prior to Jan. *January* 2nd, 1900, by the representatives of the estate of Claudio Barros?
Ans. Mr. Fernandez, who says he is the attorney in fact of Rafael Diaz Aguerria, which power of attorney he has never shown me was claiming from me several sums.
Q. Who was Rafael Diaz Aguerria?
Ans. A gentleman from Oviedo.
Q. What relation did he occupy to Claudio Barros?
—. None at all.
Q. Do you know whether or not Claudio Barros left a will?
Ans. Yes.
Q. State whether or not Rafael Diaz Aguerria claimed to be an heir of Claudio Barros?

Mr. CORNWELL: I object to the question, because it is leading.

Q. Did Rafael Diaz Aguerria make any claims with reference to the estate of Claudio Barros?
Ans. In December 1899 I showed him my account personally.
Q. Do you know who were the heirs of Claudio Barros at that time?
Ans. The widow, Mrs. Dolorez Mendez, and a boy in Mayaguez.
Q. What was the name of the boy in Mayaguez?
Ans. Maximino Barros. He sold his inheritance to Jacinto Barros, a nephew of the deceased.
Q. Who was the third heir?
—. Rafael Diaz Aguerria.
Q. What relation, if any, did you occupy towards Claudio Barro in his life time?

Mr. CORNWELL: I object to the question, because it is immaterial.

The COURT: That is not competent.

Q. Please state who was Claudio Barros?

Mr. CORNWELL: I object as the question is immaterial.
The COURT: I will let him ask it: go ahead.

Q. Who was Claudio Barros?
Ans. An intimate friend of mine and my attorney in fact for a number of years.
Q. Would you please explain what this indebtedness to which you have referred previously, what it consisted of, what was its nature, on January 2nd, 1900.

Objection by counsel for defendant as to materiality.
The COURT: The question is immaterial as to what the indebtedness was for.

Q. This indebtedness that you have referred to in your testimony, was it for value received, or for some commission or trust you had accepted for Barros?

The COURT: I do not think it makes any difference as to the indebtedness what it was for.

Q. Please state what happened on the 2nd of January or about that time?
Ans. On the 18th of December I went to the country for the purpose of collecting some money.
Q. December of what year?
Ans. Of 1899. I received a letter from Mr. Horton. When I came down from the highlands I went to see Mr. Horton at his office.
Q. Please speak of what happened with reference to the attachment on your property?

Mr. CORNWELL: I object to that question, because it is leading.
The COURT: I will let him ask that; go ahead.

Q. was repeated.
Ans. The attachment on my property took place when I was in the capital. On the 31st of December Mr. Horton had been there at my place the same day—and they asked me for a promissory note which I had paid, and they threatened me with searching my house, and being frightened out of my wits, as there was no Spanish consul here——

The COURT: I do not think that is competent.

Q. Please state the character and describe this house that you owned at No. 10 Calle Peral on January 4th, 1900?
Ans. It was a two story house made of stone or masonry,
46 and in the lower part is the store of our house—of Perez, Ramos y Compañia, and the upper story is for a dwelling.
Q. What was the value of that property at that time? more or less?

Ans. I calculated it at that time at fifteen thousand pesos, provincial currency.

Q. I hand you this "escritura" entitled "Escritura de Sociedad Mercantil," and ask you whether or not this is the "escritura" of your association, or firm?

Ans. Yes this is the one.

The COURT: That is a deed to the property.

Mr. DEXTER: No, your honor; this is the writing containing the articles of association of the firm to which this plaintiff belonged.

Mr. CORNWELL: I certainly object to it, may it please the court, because it is entirely immaterial.

The COURT: Are those the articles of association of the plaintiff's house?

Mr. DEXTER: Yes, sir; showing the interest he had in the firm and the nature of the business.

The COURT: Was his interests attached?

Mr. DEXTER: No, sir; but he alleges that his business was affected by that attachment.

Mr. CORNWELL: His business was not molested in any way.

The COURT: I think you can show he was a partner, but I do not think you can show these articles of partnership.

Q. Who composed that firm?

Mr. CORNWELL: I object to the question, because it is immaterial.

The COURT: Ask the question: Who were the partners of that firm on January 4th, 1900?

Q. was asked.

Ans. Lucas Ramos y Rios and myself, and Don Felix Suarez Infanzon as a silent partner.

Q. What was the capital of that firm?

Ans. $30000 pesos.

Q. What part of that capital pertained to you?

Ans. $10000 pesos.

Q. What was the nature, or character, of the business done by your firm?

Mr. CORNWELL: I object to that as it is immaterial.

Mr. DEXTER: There is a positive allegation in the declaration that the interests of this plaintiff in this partnership was affected by this attachment.

The COURT: Well, ask him.

Q. What was the character of the business done by your firm?

Ans. It was an importing house—wholesale and retail.

Q. Can you state approximately the profits you enjoyed the previous year as to your part?

Mr. CORNWELL: I object to the question because it is leading, immaterial and is not a proper question.

The COURT: With what view is that testimony sought to be given?

Mr. DEXTER: To meet the allegation, your honor. Not only that

he suffered in his private affairs, but in the business of the house of which he was a member.

The COURT: Do you mean to prove prospective profits?

Mr. DEXTER: No, sir; the profits, the real profits enjoyed by him the previous year and the year afterward.

Mr. CORNWELL: That will be more impossible to prove.

The COURT: I think that is too uncertain—to prove what might have been the profits expected. You can prove he was a member of the house and that the business was closed, if it was. It seems to me a good deal like a train carrying a man to a horse race and he said if the train had not run off the track he would have won a bet on the horse race.

47 Mr. DEXTER: The purpose is not to anticipate any problematical or anticipative profits in advance, but so long as he remained with the firm what were the profits and losses both before the attachment and after the attachment and up to the time when he left the firm.

The COURT: I understand the purpose is not to prove what they might have sold. He proposes to show what business the firm had actually been doing and what business they did afterwards. Now, whether this difference in the amount of business, if there was a difference, arose from the attachment or not, is for the jury to judge. I will let you ask that question.

Q. Can you state, Mr. Perez, what, if any, were the profits you enjoyed as a member of that partnership in the year 1899?

Ans. From 38 to 40%, because it was divided into 50% on the capital.

Mr. CORNWELL: I object to the answer as it is not in reply to the question.

The COURT: I will let it go in. Proceed.

Q. How long after this attachment did you remain associated with that firm?

Ans. I continued until March of this year.

Q. What did you do then?

Ans. Then I became a silent partner, at the suggestion of friends in the capital.

Q. Please state whether you retired from the house of Perez Ramos & Co.?

Ans. My friends in this city told me——

The COURT: That is not competent.

Q. State whether or not any of your creditors made any complaints which induced you to take this action?

Mr. CORNWELL: I object to the question because it is not competent.

The COURT: I do not exactly see how that is competent.

Mr. DEXTER: On the theory that he was induced to take this action by reason of the creditors, compelling him to retire, because they had no further confidence in the house, after this attachment,

and after this attachment it would not do for him to remain in the house.

The COURT: Well, proceed.

Q. I will ask you whether any representations were made to you by your creditors, or the creditors of the house of Perez Ramos y Compañia about the advisability of your retiring?

The COURT: I do not think that is competent.

48 Q. State w-ther any action was taken by the creditors, your creditors, or the creditors of your house about that time?

Ans. In Mayaguez there was nothin- owing. In respect to the house, no sir. We did not owe anything to the market here. In regard to the capital, I presented myself to the houses to whom I was owing, and I told them what was occurring in order that they might not act contrarywise and from that moment they extended considerations to us.

Q. Please state from what houses, or persons, you were receiving credit at that time?

The COURT: When was this?

Mr. DEXTER: On January 4th 1900.

Mr. CORNWELL: I object because the question is not material.

The COURT: I do not know; they might follow it up and show that the credit was withdrawn because of the attachment. This might be very material if done in consequence of the attachment on the plaintiff's property.

Q. was read to witness.

Ans. To Sucesores de Villamil, to Ochon Hermanos, Sucesores de Lopez y Compañia.

Q. How long prior to that time had you and your house been receiving credit from these parties?

Mr. CORNWELL: I object as it is not competent.

The COURT: I will let him ask it; go ahead.

Q. was repeated.

Ans. For very many years.

Q. Can you state, approximately, the amount you owed these houses on January 2nd. 1900?

Ans. The——

The COURT: That is immaterial

Q. After January 4th. 1900, please state whether you and your house were able to obtain credit from these houses?

Objection by counsel for defence as question is immaterial.

The COURT: I do not know; it may be material; ask him the question.

Q. was repeated.

Ans. With these gentlemen we have continued using our credit.

Q. Since January 4th 1900, have you, or your house, been deprived of any credits which you had enjoyed prior to that time?

Mr. CORNWELL: I object, because it is not competent: They might have been deprived of credit for some other reason.

The COURT: I cannot tell yet. Proceed with the question.

49 Q. was repeated.

Ans. I was, yes; and a great deal to the house also, of course, as was natural.

Q. Please state who these parties were and what was the cause of their refusing credit?

Ans. No party refused credit to the house, because the house did not ask credit, and even if the house had required it they would not have asked it.

Q. Well, about yourself?

Ans. So far as I myself, am concerned, friends like Mr. Manuel Canals, the silent partner of the house of Sucesores de Villamil y Compañia—I have asked him for $2000, and he has not even answered me and before that he would have given me whatever I might have asked him and also other friends here and away from this place, and although before me they have not said it, yet, naturally, they would refuse me credit.

The COURT: State only the facts.

WITNESS: It is positive that my credit suffered greatly.

Q. Prior to January 4th 1900, please state what amount of money, more or less, approximately, you were able to obtain by your credit alone and from whom?

Mr. CORNWELL: It is objected to because it is immaterial.

The COURT: It bears upon the question of his credit; I think you can show that. How much prior to January 4th it might have been ten years prior to it. Read that question again.

Q. was read to the court.

Mr. DEXTER: Your honor is right; I will re-ask it.

Q. Please state whether, within a year prior to January 4th 1900, what amount of money, more or less, you were able to obtain upon your individual credit.

Ans. I could raise a great deal, because my credit was very high.

Q. How much had you been able to raise prior to that time and within that perior?

Mr. CORNWELL: I object to that as it is not material.

The COURT: I think he can show the condition of his credit and in order to do that he may show the amount of money he was able to borrow. Proceed.

Q. How much had you been able to raise within the year prior to January 4th 1900?

Ans. I could have raised any amount I might have wanted amongst my friends, the merchants in the capital, but after that I did not dare to ask anybody for $100.

Mr. CORNWELL: I object to that answer as immaterial.

Q. Why did you not dare to ask?

The COURT: I suppose witness means he had no credit at all after that. I will let that go in. Proceed.

Q. This gentleman that refused to allow you your credit of $2000 00 you stated, I believe he was with the house of Villamil y Compañia. How much credit had you enjoyed with that house before then—a year before then?

Ans. It was Don Manuel Canal, the silent partner of the house. I think they would have given me a credit of $8000 or 10000 pesos. In this case I asked them for only $2000.

Q. State generally, without going into details what was the nature and character of the credit you enjoyed in this community and elsewhere, on and prior to January 4th 1900.

Ans. It was magnificent.

Q. State what credit you had in Europe and in other parts of the world.

Ans. We had credit there and in New York and in Spain.

Objection by Mr. Cornwell as these foreign creditors could not have known of this attachment.

The COURT: They might have been informed. Proceed.

50 Q. Please state whether or not, after January 4th 1900, this credit which you have enjoyed, prior to that time,——

INTERPRETER: I have not translated the answer to the other question.

DEXTER: Well, please translate it.

Ans. I had credit in Hamburg, New York, Barcelona, France, and everywhere I wanted it.

Q. State, whether or not, since January 4th, 1900, and this attachment proceeding you have been unable to obtain credit from any of these parties, either in Porto Rico, or in Europe or other countries?

Ans. We have not asked for any credit out of the island.

Q. But in the island?

Ans. Yes; I have within the island.

Q. Have you received any communication from your creditors since this attachment with reference to refusing you credit?

Mr. Cornwell objects to question as it is immaterial and in addition, is not the proper way to know this fact.

The COURT: You can prove that he has been refused credit, but we cannot go into any letters he may have received.

Q. Have you been told by any of your creditors since January 4th, 1900, that you could not obtain the credit from them that you enjoyed formerly?

Ans. Yes; and then I had to pass into the silent partnership.

Q. Who were those parties, if you remember?

Ans. Mr. Suarez, the active partner of the Sucesion of Villamil y Compañia.

The COURT: I think all you can prove is that this plaintiff had good credit before the attachment and that after the attachment he did not have any credit.

Q. Now, will you state, Mr. Perez, how much you have lost in your credit, otherwise, by reason of this attachment proceeding?

Mr. CORNWELL: I object to that question, because it is incompetent.

The COURT: I will let him ask it. Proceed.

Q. was repeated.

Ans. In money?

Q. Yes, and to your credit also, and otherwise?

Ans. The money which I have spent thus far in it is over $8000. pesos.

Mr. CORNWELL: It is immaterial what money he spent.

The COURT: I think you should confine it, Mr. Dexter, to damages by reason of the attachment.

Q. Now, please state what this $8000. pesos consisted of?

Ans. $1000. in the hands of this gentleman.

Q. What gentleman?

Ans. Mr. Horton, for an agreement which never came about.

Q. Pardon me; do you mean this gentleman or his client, Mr. Fernandez?

Ans. I delivered to the marshal of the court and to Pedro de Castro to deliver to this gentleman for an agreement which never came about.

Q. And Mr. Cornwell was simply representing Mr. Fernandez?

Mr. CORNWELL: I object to it as it is suggestive and immaterial.

The COURT: I do not understand, how, that is competent.

Mr. DEXTER: I do not myself know whether it is competent, but the purpose will be to show that the defendant or the plaintiff rather, paid $1000. by virtue of a proposed compromise which never resulted in anything.

The COURT: It was not a necessary expense. I do not think that is competent.

Q. Please state what expenses you were subjected to in the matter of travelling to defend this proceeding of attachment?

51 Mr. CORNWELL: I object as that is not competent.

The COURT: Cannot he show what expenses he was put to, if this attachment, was sued out without cause, or maliciously? What did you think would be included in damages to a man if an attachment was sued out against him without cause or maliciously? In that case the defendant recovers enough to make him whole. Proceed with the examination.

Q. Please state what sums of money, if any, you paid in travelling expenses for the purpose of defending this attachment suit?

The COURT: What he *necessarily* paid; what they were. Put it that way.

Q. Please state what sums of money, if any, you necessarily paid in travelling expenses in defending the attachment suit?

Ans. It was over $8000. pesos.

Q. I am asking you now about the travelling expenses only.

Answer. About $1200. pesos.

Q. Please state what travelling expenses you were obliged to incur and what trips you had to take in order to defend this attachment suit.?

Ans. I had to make several trips to the capital and I would be a month and a month and a half there.

Mr. CORNWELL: I object to this testimony, because they have not shown that this suit was in San Juan; I do not see the necessity of it.

The COURT: He says they were necessary.

Q. Who did you go to see in San Juan about this case?

Ans. Mr. Keedy; he was my lawyer.

Q. Did Mr. Keedy call you to the capital about this case?

Ans. Yes; several times, and at other times I went myself.

Q. Were there any other Americans lawyers in Mayaguez, except Horton & Cornwell at that time?

Mr. CORNWELL: I object to that question, because it makes no difference if there was one firm of American lawyers in Mayaguez, or a hundred.

The COURT: I think he has a right to go a reasonable distance to employ any lawyer that he wants, and he can show it.

Q. repeated.

Ans. No, sir.

Q. Upon these trips that you made to San Juan to talk to Mr. Keedy what did you discuss—this case or other matters?

The COURT: We will not go into all that.

Q. What other trips, if any, did you make in order to defend this attachment suit?

Mr. CORNWELL; I object to the question because it is leading.

The COURT: I cannot tell. Let us hear what he has to say.

Q. repeated.

Ans. Those to the city. Here I had to abandon all my collections and rents and everything and leave my business.

Q. With reference to the travelling expenses, how much do you say would cover the travelling expenses?

Ans. About $1200. pesos.

Q. What other items, if any, do you claim as damages?

Ans. I estimate the damages very highly.

Q. Those $8000. pesos what are they for?

Ans. Expenses incurred for lawyers, for translations of documents and for a great many other things.

Q. How much did you pay for attorneys' fees in that case?

Ans. I have paid several sums and I owe some yet.

Q. How much does that amount to?

Ans. I calculate everything at $8000. pesos, provincial currency, counting what I have paid and what I owe.

Q. Did you have occasion to consult any other lawyers in this case besides Messrs. Pettingill & Keedy?

Ans. Privately and openly I consulted all the lawyers here in Mayaguez.

52 Q. State just the amount you have paid, and have obligated yourself to pay, for the lawyers you consulted and retained as attorneys in this matter; those that you accepted and considered as attorneys in the case?

Ans. Shall I take into account the $1000 pesos I spoke of?

Q. No, no.

Answer. Some three thousand pesos, provincial money.

Q. Can you state approximately in figures, in dollars, the amount which your credit has been injured, if at all, by reason of this attachment?

The COURT: That is a matter for the jury.

Q. What amount of money, if any, did you lose in any other respect on account of this attachment?—lost of time and profits to your business, if any?

Mr. CORNWELL: I think that question is incompetent.

The COURT: He can prove any other money that he necessarily paid out on account of this suit.

Q. was repeated.

Ans. I consider as expense some $5,000 *dollars* with what I have paid and what I now owe, and as damages suffered——

The COURT: He can testify to the facts and the jury can fix the damages.

Q. How has your business interest, both personal and as a partner of your house, been affected, and your credit been affected by that attachment? What effect has it had on your business?

Ans. I had said the report have been current that I have been both in person——

The COURT: I think this witness has gone over very fully, what effect this had on his credit, and unless there is something new, we had better go to something else.

Q. I believe you stated that you retired from the firm of Perez Ramos y Compañia in April of this year, isn't that correct?

Ans. Yes.

Q. State whether or not, prior to January 4th 1900, you had concealed or disposed of any property so as to prevent your creditors from securing any judgment against you.

Mr. CORNWELL: I object to the question, because it is leading.

The COURT: I do not think it is leading, and I will permit it to be asked; that is the very ground upon which the attachment was sued out.

Q. State whether or not, prior to January 4th 1900, you had disposed of any of your property, or concealed it so as to prevent your creditors from enforcing a judgment against it?

Ans. No, sir; I had not.

Q. State what properties and assets, in a general character, you had on the 4th day of January, 1900, with which to pay these debts?

Ans. I have got a note of them; Mr. Dexter has the note.

Q. Speaking in a general way, I mean; I do not want you to go into details. Did you have any other property besides this house?

Ans. I have two more. I hav- a coffee farm; three cities properties and a coffee plantation, and besides other goods and other city properties, and my capital there in the firm of Infanzon & Co.

Q. On January 4th 1900, approximately, making a general estimate—what were your assets with which your creditors could have been paid at that time?

Ans. About $40,000 pesos, provincial money; that is, in the two commercial houses of Perez Ramos & Co., and Infanzon and Co., which is now in liquidation. I did not owe anything to anybody, and besides the shares which I have in the railway between Lares and Añasco. and other credits.

53 Q. How much did all that amount to, approximately?

Ans. I calculated my credit at seventy thousand (70,000) pesos, provincial currency. I calculated that I must have had some fifty thousand pesos over and above my debts.

Q. Before this attachment suit, what conversation, if any, did you have with Mr. Fernandez with reference to paying that debt due to the estate of Claudio Barros?

Ans. I was at the house of Mr. Fernandez several times in reference to the matter, in spite of the fact that since the year 1892 we did not speak to each other.

Mr. CORNWELL: I move to have the answer stricken out as it is not responsive to the question.

The COURT: Let him go ahead and get through with it. What was the conversation?

(Witness continuing:) Mr. Fernandez spoke to our silent partner, Mr. Infanzon.

Q. Were you there?

Ans. No, sir.

Q. Testify only to the conversation you had with Mr. Fernandez.

Ans. I had a conversation with Mr. Fernandez with a view of arranging this affair, and I went to his house, and he claimed sums which I did not owe. I went three or four times, and seeing how he was, I said it was impossible for me to come to an agreement with this man. At no time during these visits did he ever show me his power of attorney.

Q. And why was it that you did not pay that money to Mr. Fernandez?

The COURT: I do not think that is competent.

Q. State whether or not any threats were made by Mr. Fernandez, and if so, what they were?

Mr. CORNWELL: I object to that because it is not competent.
The COURT: It may be competent. Gentlemen, the gist of this action is whether there was proper cause on Fernandez' part to sue out this attachment, and whethe- it was done with malice. Continue.

Q. Were any threats made by Mr. Fernandez with reference to this matter and the attachment suit?
Ans. Not with the attachment, but with this affair.
Q. Before the attachment?
Ans. Before the attachment he told me himself that they were going to attach me; he himself told me that when I went to complain to him and he threatened to bring me before the court and I asked him not to bring me before the court on account of the damage it might cause me; and then he told me that I would have to go to the court, and I would know what it would cost me to speak to an American lawyer.

Mr. CORNWELL: I object to all that testimony because it is not competent.
The COURT: I think that conversation with the defendant is competent.

Q. Did you discuss with Mr. Fernandez his right to bring any such attachment, before it was brought?

The COURT: Do not lead him.

Q. What was stated by you to Mr. Fernandez with reference to his right to bring such attachment proceeding?

Mr. CORNWELL: I object because the question is leading.
The COURT: I think he can call the attention of the witness to any part of the subject talked about.

Q. was repeated.
Ans. I went there to his house and I told him that it seemed incredible that after having come to his house, after being so many years without speaking to each other, that he should want to bring me before a court like that; that I did not understand that court, and that after so many misfortunes that I had suffered that I should be bro-ght before a court of which I was greatly in fear.——

54 Mr. CORNWELL: I object to that as it is only stating his feelings.
The COURT: The witness has a right to relate the conversation.

Q. Did you have any conversation with Mr. Fernandez, before he brought the attachment proceeding, as to what reason you had, why

you refused to pay the debt, or as to why he could not bring any attachment proceeding?

The COURT: That is objectionable as to the debt.

Q. Did you have any conversation with Mr. Fernandez before he brought the attachment proceeding as to whether he had the right to bring the attachment proceeding?

Mr. CORNWELL: I object to that your honor, it is not competent.

The COURT: Suppose he told Mr. Fernandez that he had fifty thousand dollars, and this building, and that building, and the debt was for only five thousand dollars, don't you think it competent for him to tell Fernandez that—he could pay the debt without any attachment being issued against him for it? Proceed with the question.

Q. was repeated.

Ans. Not with him, but with the lawyers.

Q. Did you, or your attorneys, discuss that matter with Mr. Fernandez as to your ability to pay the debt and the reason why the attachment should not be sue- out?

The COURT: That is objectionable. He cannot testify as to what his lawyers did; he must testify as to his own actions.

Q. Was anything said by you to Mr. Fernandez about your ability to pay this debt without attachment, and as to whether he should not bring the attachment?

Ans. I knew that Mr. Fernandez was not the man to collect from me, and I——

The COURT: That is not competent.

Q. Did you ever have any conversation with Mr. Fernandez about bringing the attachment proceeding?

Ans. No, sir; he brought the suit without telling me anything about it.

Q. In what manner was this attachment, and notice of attachment, served upon your property?

Ans. I was in the capital when it was placed there.

Q. Did you see the notice when you returned?

Ans. It seemed that the wind or the rain had destroyed it but my partners saw it, and the nails are there yet. I was in the capital for a month at that time.

Q. Immediately following this attachment proceeding, what demands, if any, were made upon you by your creditors—immediately following?

Ans. They did nothing, but they were doubtful.

Q. Were bills and claims presented immediately afterwards?

Ans. No. I cannot say that anybody said exactly—"We cannot collect from you on that account," but the house of Fritze, Lundt y Cia. collected from my partner a private note which I had in the house, and they did not say why they wanted to collect it, and it had been there a long time previously.

Cross examination.

By Mr. CORNWELL:

Q. Was that note due and payable?

Ans. Yes, from the day I gave it — was due; it was a long time overdue.

Q. How much money did you say you owed to the estate of Claudio Barros?

Ans. I think it was something like six or seven thousand pesos.

Q. What did you say your wealth was, approximately, on January 4th 1900?

Ans. I calculated that I had some seventy thousand pesos, provincial and with what I owed deducted from it, I calculated I had about fifty thousand or forty five thousand pesos.

Q. When you spoke first about settling this account due to
55 the estate of Claudio Barro, was your property mortgaged?

Ans. Yes, it was.

Q. When did you first speak to Mr. Fernandez about this settlement?

Ans. About the end of November, I think, it was in 1899.

Q. Was it not about the first of December?

Ans. I do not remember exactly when it was, but when I went to the country, I received this letter (producing same).

Q. What is the date of that letter?

Ans. The 18th of January.

Q. Was that the time that you spoke to Mr. Fernandez?

Ans. No, that was some time before; in November or December.

Q. Your property was not mortgaged at the time you spoke to Mr. Fernandez?

Ans. Yes; it was mortgaged.

Q. And you owed the amount of money you were sued for?

Mr. DEXTER: I do not think that is competent, may it please the court.

The COURT: I do not think it is competent. He has already said he owed Barros so much money.

Q. Is that a mortgage on your property? (Handing witness a paper.)

Ans. It appears to be that. I will have to read it (reads it). Yes; that is the mortgage.

Mr. CORNWELL: I now offer this mortgage in evidence.

Mr. DEXTER: I object to it as incompetent, irrelevant and immaterial.

The COURT: What is it?

Mr. CORNWELL: This is a mortgage made on all the properties of Mr. Perez; made about the time of these law suits and covers all his property. The date of the attachment was January 2nd, and this mortgage was made on November 10th, 1899, before that time.

The COURT: I will permot you to offer it: it is only a mortgage, is it not?

Mr. CORNWELL: Yes.

Whereupon said mortgage was offered and introduced in evidence, and a translation thereof duly certified by the official interpreter of this court is in words and figures following to wit:

COPY OF EXHIBIT "A" FOR THE DEFENDANT.

No. 973.

In the city of Mayaguez, December 10th, 1899.

Before me, Mariano Riera Palmer, l-wyer, resident of Mayaguez and notary public of the same and of the illustrious College of Porto Rico and witnesses at the end mentioned, appear: Don Jose Perez y Fernandez, of age, married, merchant and resident of this city. I give credit to know him, his profession, and residence and he, assuring me to be enjoying his civil rights and believing he has the necessary legal capacity to go into this deed of voluntary mortgage, he says:

First. That he is the owner of the following property: a wall house measuring 22 "varas" front, same being equivalent to 18 metres, 38 centimetres, 98 millimetres; and 10 "varas" in length, same being equivalent to 8 metres, 35 centimetres, 90 millimetres, and a shed of all the length of the house, being 2 varas wide, same being equivalent to one metre, 75 centimetres and 18 millimetres, said shed is annexed to said house and it and the lot which belongs to him is situated in the "Barrio Septentional" in this city. Said lot measures 22 varas at the front, which metrical equivalent has been said, and 37 varas long, being equivalent to 30 metres, 92 centimetres, 83 millimetres, being bounded on the north by the
56 property which was of Don Honorato Fernandez; on the south by the river; on the east the street going to "La Puntilla," and whereby the said house has one of its fronts, and the west by said river and the sea. He owns said property because he bought it from Don Claudio Barro y Fernandez, as it is stated in a deed issued in Santa Eulalia de Collato (Consejo de Oviedo, Spain) the 25th of August 1897, before the notary of said town Don Cipriano A. Pedrosa, a first copy of which is shown to me for this act and which appears recorded at the registrar of property, folio 250, volume 36, of this city, property 869, duplicate, fourth inscription; this property being free from responsibilities or obligations.

Second. One parcel of land which superficial extension is 50 cuerdas, which are equivalent to 19 hectares, 65 ares and 19 centares, which are dedicated to the planting of coffee, bananas and to pasture and situated in the Barrio of "Bucarabones" of the municipality of Las Marias; a wooden house, roofed with galvanized iron, low by its front, and there being in front of it a grinding meal- for coffee, with a wooden kitchen covered with zinc; a small house with a grinding mill for coffee moved by water; a water tank for washing said fruit; three explanades for drying; and two small wooden houses covered with zinc; said parcel of land is bounded on the north by lands the property of Don Emilio Gomez and Don Martin Daud;

on the west by the Rio Grande; on the south by lands the properties of Don Felix Monsegur, on the east by the coffee plantation of Don Bernardo Daud. And another parcel of land, situated in the barrio before named "Jurnia" and now "Palma Escrita," municipality of Las Marias, said parcel of land has an extension of about 35 cuerdas equivalent to 13 hectares, 78 ar*eas* and 69 centiar*eas*; being bounded on the south by property which was before of Don Carlos Gaud and Jose Laplaza's wife and thence in a straight line to a "Tartago" on the top of a hill; thence in a western direction the same boundary and lands of the plantation of Don José Sauveterre and Señor Delgado, to a "balla," in a straight line to a "Tartago" before a high palm, limiting the lands with property of the heirs of Monsegur to a "laurel" at the shores of the Rio Grande, thence following the creek shores to a "higuerillo," the place by which it was begun. The two rustic properties above described were acqquired by him by buying them from Doña Jobita Denizar, according to a deed issued before me on the 17th of February 1897, a fresh copy of which is shown to me for this act and which does not appear to have been recorded in the registrar of property.

Third. One rustic property or parcel of land being planted in coffee, bananas, pastures, brambles and briars; consisting of about 14 cuerdas being equivalent to 5 hectar*eas*, 60 ar*eas*, 25 centar*eas*, and 4 milliar*eas*; in the barrio of "Bucarabones" formerly named "Jurnes" site called "Palma Escrita" municipal district of Las Marias, judicial district of this city. Said parcel of land is bounded on the south by lands before the property of Don Carlos Gaud, and now of Don Juan Aguasvivas; on the east by lands the property of Jose Laplaza, on the north by other lands, the property of Justo Gaud; on the west by a river called "Guabas." Besides these it is surveyed, beginning on the east from a "tartago," from thence the same direction to the north to another "tartago;" from thence towards the west with turns and returnings to an oak tree at the shores of the River "Guabas;" from here upwards the river to a "Collor' palm, and from here in a straight line to the part wherefrom it was begun. He acquores the said property by buying it from Don Gerarso Gonzalez according to a deed issued before Don Juan Z. Rodriguez, who is a notary of this city on the 5th of February 1897 which first copy is shown to me and which does not appear recorded in the registry of property.

57 Fourth. A wooden house covered with roof tile on Minerva street, of this city, marked No. 6, and lot on which it is built and all its dependencies; measuring 12 metres, 75 centimetres from the front, 13 metres and 80 centimetres at the side; being bounded: entering by the right hand side by a house the property of Don Jaime Busquet; entering by the left hand side by another house the property of the heirs of Don Valentin Torrens; and on its back by that of Maria Garcia; the front being on the north, it is bounded on that side by said Minerva street. He acquired this property by buying it from Don Salvador Mestre according to a document issued before me on the 30th of Decembre 1892, a first copy of which is shown to me for this act which appears recorded on the registry of property at

folio 136, volume 25 of this city, property No. 1567, inscription 2nd. Said house does not exist now because it has been destroyed.

Fifth. A brick house covered with roof tile, with all its dependencies on Carcel street, now named Peral street, where the front of said house is and with which it limits on the west, making a corner with Minerva street, both of this city, and whereby it has its wooden balcony, being marked No. 10, measuring by the front 17 metres, 48 centimetres, by its right side, that is by the north and by Minerva street, five metres, 61 centimetres, by the left that is by the south whereby it is bounded by a house the property of Don Miguel Pinillo, 8 metres and 75 centimetres, and by its back that is by the east, thereby it is limited by a house the property of Silvain Martinez and Carlos Cordero, 17 metres, 82 centimetres. It is bui-t on a lot of the same dimensions, which also belongs to him. He owns said property because he bought it from Doña Julia Bernar according to a deed made before me on the 12th day of January 1893, the first copy of it being shown me for this contract and it appears recorded in the registry of property, folio 103 and over, volume 3rd of this city, property 173, inscription 5th. Said house does not exist because it has been destroyed.

Sixth. A wooden house (half high) tile covered, with a balcony at the front on Sol street of this city, having the front on the south, with its kitchen and dependencies, being bound on its right side, that is, the east by the property of Don Simon Maderas; on the left side, that is, on the west, by a house the property of Don Manuel Pinillo, and on its back, that is, on the north, by another house the property of Silvain Martinez, being marked No. 26, being 10 varas long by front, same being equivalent to 8 metres, 35 centimetres, 90 millimetres and 9 varas long at the side being equivalent to 7 metres, 52 centimetres, 31 millimetres. It is built on a lot that also belongs to him, the same being 13 varas long at the front, which is equivalent to 10 metres 86 centimetres, 67 millimetres and 18 varas long at the side, equivalent to 15 metres, 4 centimetres, 62 millimetres. Said property belongs to him by buying it from Doña Maria and Doña Antonia Garcia, according to deed made before the notary of the capital of this lawyer, Lawyer Don Jose Agustin de la Torre, on the 10th say of May 1894 and on the 22nd day of May 1899, before the notary of Habana, Don Francisco de Castro y Vasquez, which first copies are shown to me for this contract, and which are recorded in the registry of property. Said house does not exist, because it has been destroyed by fire.

Grouping of properties.

2nd. That the lots described under Nos. 4, 5 and 6 actually form one sole property, and which he hereby groups that they may be recorded at the registry of property as one sole property with one sole number for all of them, and the result of said grouping is as follows: A lot having one front on Peral street whereby it is bounded on the west, measuring 17 metres, 26 centimetres; on the north, by Minerva street whereby — measures 18 metres,

39 centimetres; it is bounded on the east by the house of Lawyer Don Francisco Pellegri, and lot of Don Eusebio Brian whereby it measures 28 metres, 84 centimetres, and on the south
58 by Sol street and the house the property of the heirs of Pinillos, whereby it measures 10 metres, 86 centimetres, 67 millimetres; on which lot exists a brick house two stories high, the second floor being destinated to residences, and the first to stores, the same being covered with zinc and having a balcony on the side of Peral street, and a small brick balcony on the side of Minerva street with no number. The same measures 17 metres and 48 centimetres at the front and 18 metres, 35 centimetres long at the sides.

Confession of debt.

3rd. Señor Perez y Fernandez confesses and acknowledges to owe Don Victor Ochoa y Perez, of age, widower, merchant, resident in the Asturias and of the vicinity of the capital of this island, the sum of twenty thousand pesos, P. R. currency, which said gentleman has given him for different purposes.

Payment.

That he obliges himself to pay to his creditor Señor Ochoa, the sum of twenty thousand ($20,000.00) pesos which he owes him, within the term of five (5) years counting from this date, without premium or interest.

Mortgage.

5th. To guarantee the aforesaid obligation the debtor, Señor Perez y Fernandez, specially mortgages in favor of creditor, Don Victor Ochoa y Perez, the properties described under numbers 1, 2 and 3 and the groupings of the ones under numbers 4, 5 and 6 with house, and the rest which constitutes it. Said properties remain with said obligation until all debts to be paid.

6th. According to what is provided by the mortgage law "Ley Hipotecaria," the grantor distributes the capital of said obligation in the following way: The house described in the first place will be responsible for $2000.00 capital; the property of 50 cuerdas described in the second place, will be responsible for $1500.00 of capital; the one of 35 cuerdas will be responsible for $1500.00 of capital; the one described of number 3 of about 14 cuerdas, shall answer $2000.00 of capital; and the property formed by groupings made in the second clause will answer for 12000.00 of the amount of the debt.

7th. According to what is provided by paragraph 137 of the mortgage law, the appearer assesses the mortgaged properties, renouncing all new valuations, or action with this purpose in the following way:

The first in the sum of $3000.00 of currency.

The second of 50 cuerdas in the sum of $5000.00.

The third of 35 cuerdas in the sum of $3000.00.

The one described under No. 3 of 14 cuerdas in $3000.00.

The one resulting from the groupings before made in the sum of $14000.00.

Notification.

I, the notary, notified them that: confessed, as it is, the debt, there is no place for any exception of its not being true, therefore, the properties mortgaged by this deed are obliged to the responsibility of the same, though it should be proved afterwards that it was not received in all or in part; that the preferred legal mortgage which the province and municipalities of this city and Las Marias have any other creditor for the collection of the last annuality of taxes not satisfied by the mortgaged properties is in favor of
59 said province and municipality; that this deed must be recorded in the registry of properties in this city, that without said requisite it will not prejudice any third person, neither will it be admissible before any court, council or office of the government. So it is consented to and signed by the witnesses, Don Jose Carmona and Don Luis Cardona residing in this city, previous reading that in only one act I did to all, and advised them of the right granted to them by the law to read it by themselves, of which I give credit.

JOSE PEREZ Y FERNANDEZ,
(Signed) MARIANO RIERA PALMER, *Lawyer.*
JOSE CARMONA,
LUIS M. CARDONA.

It corresponds faithfully with the original deed, which, under number firstly said (973) is filed in the protocol of this notary in my charge. Crediting it and being asked by Señor Don Jose Fernandez, I issue this copy in eight sheets of paper.

Mayaguez November 20th, 1901.
(Signed) MARIANO RIERA PALMER, *Lawyer.*

The foregoing is a true and faithful translation of its original.
(Signed) Z. VALS ESPINOSA,
Interpreter United States District Court for Porto Rico.

Mr. DEXTER: In order to get a decision from the court as to a certain question of law, I renew now my objection to the introduction of this mortgage as testimony for the reason that it is immaterial, irrelevant and incompetent testimony, and is irrelevant and immaterial to the question of want of proper cause or malice in this case.

(The court orders the jury to retire during the argument.)

Mr. Dexter argues at length stating that the question of malicious prosecution, as well as actual damages and wrongful attachment enter into this case, and cites and reads the following law:

Am. & Eng. Ency. Law, pp. 244-245 (Attachment—a—.)
Mitchel *vs.* Mattingly, 1st. Metcalf, 237.
Kennedy *vs.* Meachem, 18 Fed. Rep., 212.
Tybier *vs.* Alford, 12th Fed. Rep., 262 (C. C. La.)

Mr. Cornwell and Mr. Horton replied.

The COURT: Well, let us proceed with the case. I will let that testimony be offered at present. I will control it afterwards.

(Plaintiff excepts.)

(The jury returned to their places.)
The COURT: Proceed Mr. Cornwell.

By Mr. CORNWELL:

Q. When did your partnership papers with the house of Perez Ramos & Co. expired?
Ans. In 1898.
Q. And you operated from 1898 up to March of this year without partnership papers?
Ans. Prorogues of extensions have been made.
Q. When was the termination of the last prorrogation?
Ans. In 1900.
Q. Are you a member of the Sucesores of Perez Ramos & Co. of the succeeding firm?
Ans. I was an active partner of the previous one and am a silent partner of the present one.
60 Q. What is your present business now?
Ans. Now? I have several in project but I am not undertaking any in full.
Q. Was Victor Ochoa y Perez here when you made this mortgage?
Ans. No, sir; he was in Spain.
Q. Did you take this mortgage to the registrar's office to have it registered?
Ans. No, sir; my partner took it there.
Q. When did you have it registered?
Ans. I do not know; it was when I was in the capital. I have the order for its registration.
Q. When did you return from San Juan at the time of this mortgage?
Ans. I think it was when the court came here for the first time; I cannot be sure about it.
Q. Were you in the city the day Mr. Lutz served the writ of attachment on that property in Mayaguez?
Ans. At what date?
Q. The date of the attachment; when the writ of attachment was posted on your door, were you in the city of Mayaguez?
Ans. No, sir, I was not. I was in the capital. I left here on the 31st of December, 1899, and arrived in the capital on the 1st of January, 1900.
Q. Did you not try to settle this suit by an amicable arrangement?

Mr. Dexter objects to the question.
The COURT: Settle what suit?
Mr. CORNWALL: This attachment suit. It was a proper suit.
The COURT: The question is on the attachment, whether it was a wrongfull and malicious attachment, and not whether this was a proper suit.
Mr. CORNWALL: That is all we want to ask.

In rebuttal.

By Mr. DEXTER:

Q. This mortgage that has been shown you, for what was it executed?

Mr. CORNWELL: I object to that as the mortgage will show for itself.

The COURT: Read that mortgage again. I want to hear that part of it.

Mortgage was re-read.

The COURT: Proceed with the question.

Q. Please state, Mr. Perez, whether you owed money to Mr. Victor Ochoa, the twenty thousand pesos represented in this mortgage, at that date?

Mr. CORNWELL: I object to the question as the mortgage shows for itself and that is the best evidence.

The COURT: Let him answer the question.

Q. was repeated.

Ans. Yes, to Victor Ochoa.

Q. What was that indebtedness for?

Ans. For various business that I had in project and for other payments.

Q. State whether or not Mr. Victor Ochoa had advanced you an equivalent amount of money or property prior to this time as stated in this mortgage?

Mr. Cornwell objects as the mortgage ought to state all that.

The COURT: Well, I will hear what he has to say about it.

Q. State whether or not Mr. Victor Ochoa had facilitated to you with this amount of money prior to this time as stated in this mortgage?

Ans. Yes.

Q. State what amount of business, and the nature of the transactions you had had prior to that time with that gentleman?

The COURT: I do not think that is competent.

Q. Did this mortgage cover all the property you had at that time?

Mr. CORNWELL: I object to the question as the mortgage itself shows it covered all his property.

The COURT: We do not know; let him go on and answer the question.

61 Q. Did this mortgage cover all the property you had at that time?

Ans. A small part of it only.

Mr. DEXTER: That is all.

And thereupon, further to maintain said issues, said plaintiff introduced as witness in his behalf one, LUIS BRAVO, who, after being duly sworn testified as follows:

(Direct examination.)

By Mr. DEXTER:

Q. What is your name?
Ans. Luis Bravo.
Q. Have you been a resident of Mayaguez for many years?
Ans. Yes.
Q. What is your business?
Ans. I am a merchant.
Q. How long have you been in that business in Porto Rico?
Ans. Fifty-two years.
Q. Your business is an important one, and the nature of its transactions are important?
Ans. Yes.
Q. Do you know Mr. Perez, the plaintiff in this case?
Ans. I have known him since he arrived on the island.
Q. How long ago was that?
Ans. I cannot say precisely; probably ten or fifteen years.
Q. Do you know the character and credit which Mr. Perez enjoyed in this community up to and prior to January 4th, 1900?

Mr. CORNWELL: I object to the question because it has nothing to do with this case.
The COURT: I think it is competent. Let him proceed.

Q. was repeated.
Ans. Yes.
Q. What was it, good or bad?
Ans. It was good.
Q. Had you had occasion to know approximately the amount of credit which Mr. Perez enjoyed in this community?
Ans. No, sir; I could not precise that, but it was to a certain extent, probably fifteen or twenty thousand dollars.
Q. Do you know whether or not that credit or standing which he had in the business community was affected by a certain attachment suit instituted against him?
Ans. I do not think so. I know that any merchant who has a case like that it always affects him in some way or other.
Q. But do you know *not* of any particular occasion?
Ans. No, sir.

Cross-examination:

Q. Have you personally ever done any business with Mr. Perez?
Ans. Yes, sir.
Q. Most of it was in the house of Perez, Ramos & Co., was it not?
Ans. Perez, Ramos & Co., yes.
Q. When you referred to the credit of fifteen or twenty thousand pesos, you referred to the credit of the house, *do* you not?

Ans. Yes, sir.
Q. And you do not refer to any individual credit of Mr. Perez?
Ans. No, sir.

In rebuttal.

By Mr. DEXTER:

Q. What was the character of Mr. Perez in this community as a business man?
Ans. That is good also, he has always been honorable in his dealings.
62 Q. Had you heard at any time, or did you know, particularly on or about the 4th of January, 1900, that he had parted with, or concealed any of his goods?

The COURT: I do not think that is competent.
Dexter argues the point.
The COURT: Ask him and let us get through.

Q. Do you know whether Mr. Perez, prior to January 4th 1900, had disposed of or concealed any of his goods for the purpose of avoiding the payment of any of his debts?
Ans. I am not aware of it. I never heard of it.
The COURT: And you do not know anything about that one way or the other?
Ans. No, sir.

And thereupon further to maintain the said issues said plaintiff introduced as a witness in his behalf one HUBERT KOBERG, who after being duly sworn testified as follows:

Witness, HUBERT KOBERG, for plaintiff.

Direct examination.

By Mr. DEXTER:

Q. Please state your name and occupation?
Ans. I am a merchant, my name is Hubert Koberg.
Q. What house are you connected with?
Ans. Fritze Lundt & Co.
Q. How long have you been in Porto Rico?
Ans. About ten years.
Q. What is the character of the business transacted by the house of Fritze Lundt & Co.?
Ans. Export and import and banking.
Q. How long have they been in that business here?
Ans. About eight years under the style of Fritze Lundt & Co.
Q. Do you know Mr. Perez, the plaintiff in this case?
Ans. Yes.
Q. Do you know what his character and reputation and credit as a business man of this community was prior to January 4th 1900?
Ans. Yes.

Q. How long had you known him and of his credit in this community as a business man prior to that time?

Mr. Cornwell objects to the question, stating it is leading.
The COURT: That is not leading, proceed.

Q. was repeated.
Ans. About all the time I have been in Porto Rico; about eight or nine years.
Q. Have you or your house had any transaction with Mr. Perez in the matter of extension of credit?
Ans. With this house, yes.
Q. Have you had any on account of Mr. Perez himself?
Ans. Some years ago; several years ago.
Q. What was the credit of Mr. Perez, in this community, so far as you know; was it good or bad?
Ans. It was a good credit.
Q. State whether or not he personally, or for his house, had carried any credits with your house?

Mr. CORNWELL: I object to anything about the house as we are not inquiring into the credit of the house.
The COURT: Proceed with the question. You can cross-examine him about that.

Q. was repeated.
Ans. Yes.
Q. Do you know who was the principal member of the firm of Perez Ramos & Co.?
Ans. Yes.
Q. Who was it?
Ans. Mr. José Perez and Mr. Lucas Ramos.
63 Q. Did you extend credit to him personally, or to his house of Perez Ramos & Co.?
Ans. Of course I did; it was his house.
Q. Did you do it through him or to him?
Ans. Through him, yes.
Q. Was that credit good or bad?
Ans. It was a good credit.
Q. Are you able to state how much credit he had?
Ans. I am not certain about that.
Q. Do you know of the attachment proceeding that was brought against him, in January 1900?
Ans. I heard something about it; yes.
Q. Did that attachment proceeding have any effect upon his credit in this community as a business man?
Ans. Yes.
Q. Are you able to state to what extent, approximately, and in what way it did have effect upon Mr. Perez?
Ans. He did not have so much credit; he had less credit.
Q. Did it destroy all his credit, or to a certain extent?
Ans. No, not all but to a certain extent, yes.

Q. Seriously, or slightly?
Ans. I cannot say that; I do not know that.

Cross examination.

By Mr. CORNWELL:

Q. You really do not know, of your own knowledge, whether it injured his credit at all?
Ans. Yes, it certainly injured his credit.
Q. Would it have hurt him in buying goods in the market?
Ans. Well, in some cases, yes; some times.
Q. You think it would have made some difference?
Ans. Yes.
Q. Are you referring to the personal credit of Mr. Perez, or to his house?
Ans. To his personal credit.
Q. You do not know that personally he ever had any credit? You knew though his house had credit?
Ans. Mr. Perez had also credit.
Q. And you think that suit destroyed that credit?
Ans. In a certain way, and at times, yes.
Q. It may have temporarily have injured his credit, but not permanently?
Ans. Not permanently, no.
Q. His credit now is as good as ever?
Ans. He does not ask any credit.

In rebuttal.

By Mr. DEXTER:

Q. Did not Mr. Perez, for himself, or representing his house, carry large credits from time to time with your house before January 1900?
Ans. Several years ago, yes.

Recross-examination:

Q. In recent years he has not; in the last two or three years he has not.
Ans. No.

64 And thereupon, further to maintain said issues, said plaintiff introduced as a witness FREDERICK PHILLIPPI, who, after being duly sworn testified as follows:

Witness, FREDERICK PHILLIPPI, for plaintiff.

(Direct examination.)

By Mr. DEXTER:

Q. Please state your name, occupation and residence?
Ans. Frederick Phillippe, I am a merchant and live in Mayaguez.
Q. How long have you lived in Mayaguez?

Ans. Twenty-nine years.

Q. What class of business have you been engaged in?

Ans. General merchandise. Importing; exporting; and buying coffee.

Q. Do you know Mr. Perez, the plaintiff in this case?

Ans. I know him, yes.

Q. How long have you known him?

Ans. About fifteen years.

Q. Do you know what was the credit and standing of Mr. Perez in this community as a business man prior to January 4th, 1900?

Ans. His credit and standing was good.

Q. Do you know whether or not on January 4th, 1900, or prior to that time, Mr. Perez had disposed of any of his property for the purpose of defrauding his creditors?

Ans. I had not heard anything about that.

Q. Do you know of a certain attachment suit brought against Mr. Perez in the provisional court by Mr. Fernandez?

Ans. I had heard something of that,

Q. Do you know whether or not Mr. Perez' credit in this community as a business man has been injured by this attachment suit?

Ans. I do not think so.

Q. Is it your judgment that since the time the attachment suit was brought that Mr. Perez could get the same credit as before in the commercial world where he had been accustomed to get credits previously?

Ans. I cannot give any judgment about that. Credits have been changed very much. All the people in the country——

Q. I am not asking you about any specific case but I am asking you as a business man here in Mayaguez whether or not the attachment of a merchant's property—valued at fourteen or fifteen thousand pesos, and the merchant having seventy thousand pesos worth of property, whether——

Mr. CORNWELL (interrupting): I object to that your honor. Let the witness testify to facts and not to any suppositions.

The COURT: I think he can ask a question bases on a supposition.

Q. was repeated with the addition: An attachment suit brought against such a merchant for the sum of thirty-two hundred pesos do you think such an attachment proceeding would, or would not, affaect the credit of such merchant?

Ans. For thirty-two hundred pesos.

Q. Yes.

Ans. No.

Q. Do you think that an attachment suit for an amount of that kind would affect his credit?

Ans. Of a merchant of such means?

Q. Yes.

Ans. No.

Q. You think that persons not living in the community but liv-

ing abroad and being advised of that suit, don't you think that that would affect his credit with them?

Ans. It might in some cases. I cannot judge of this particular case; I have not heard about it.

Q. You mean to say that you do not know whether his credit was affected or not, do you not?

Ans. I do not know whether it was affected or not. I cannot give any opinion in that question.

Mr. DEXTER: That is all.

Mr. CORNWELL: No cross-examination.

65 And thereupon further to maintain said issues, said plaintiff introduced as a witness ALFRED KOESTER, who, after being duly sworn, testified as follows:

(Direct examination.)

By Mr. DEXTER:

Q. Please state your name?

Ans. Alfred Koester.

Q. What business house are you connected with, if any?

Ans. Moral y Cia.

Q. Where do they do business?

Ans. In Mayaguez.

Q. How long have you lived in Mayaguez?

Ans. Three years.

Q. How long has your house been doing business here?

Ans. I could not say; a number of years.

Q. What kind of business do you do?

Ans. Export and import; buying coffee sugar and molassess, and importing provissions from the States.

Q. Please state whether or not you know José Perez, the plaintiff in this case?

Ans. Yes, I know him.

Q. State whether or not you knew his reputation and credit as a business man in this community prior to January 4th, 1900?

Ans. His credit was good.

Q. Could you estimate to about what extent that credit was good?

Ans. I could not fix the amount.

Q. Approximately?

Ans. No, I could not tell.

Q. Did you, or your house, do any transactions in the way of credits to Mr. Perez?

—. Yes, a good deal.

Q. For how many years back?

Ans. Since I have been in the house for three years. We did quite a large business with him.

Q. Could you approximate the amount of credits you carried with him?

Ans. No.

Q. Were they of importance or slight?
Ans. A fair credit; a very good credit.
Q. Did you know of Mr. Perez having disposed of any of his property for the purpose of hindering or defrauding his creditors prior to January 4th, 1900?
Ans. No.
Q. Do you know whether or not—or, in your judgment has the bringing of that attachment suit in the provisional court against him attaching his property on a claim of 3200 pesos, had any effect on his credit?
Ans. Just to a certain extent.
Q. Are you able to state to what extent?
Ans. No.
Q. What effect would it have upon his ability to obtain credit since that attachment; would it be more difficult or easier for him to obtain credit after that?
Ans. It would be more difficult.

Cross-examination.

By Mr. CORNWELL:

Q. Upon what do you base your theory?
Ans. I could not tell why but — is a fact.
Q. You cannot tell why but you know it is so?
Ans. Yes.

66 And thereupon further to maintain said issues, the plaintiff introduced as a witness in his behalf one ELISEO FONT Y GILLOT, who, after being duly sworn, testified as follows:

Witness, Dr. FONT, for plaintiff.

(Direct examination.)

By Mr. DEXTER:

Q. What is your occupation?
Ans. I am a collector of internal revenue.
Q. How long have you lived in Mayaguez?
Ans. About eleven years.
Q. Do you know Mr. Perez, the plaintiff in this case?
Ans. Yes.
Q. How long have you known him?
Ans. Eight or nine years.
Q. Did you know his standing and credit as a business man in this community prior to January 4th, 1900?
Ans. I always knew him as a person who enjoyed good personal credit and good personal prestige.
Q. Was this credit and prestige important or very slight?
Ans. It was important because he was a merchant of good standing in the community and on a large scale.

Q. Did you know of the attachment suit brought in the provisional court against Mr. Perez?

Ans. Yes.

Q. What effect has that attachment suit brought against Mr. Perez had on his standing and credit in the community as a business man?

Ans. I understand that any attachment of that kind upon any merchant must injure his credit and diminish it.

Q. Do you know whether or not Mr. Perez prior to January 4th, 1900, had disposed of any of his property with the intention of defrauding his creditors?

The COURT: I do not think he could know the intention of the party.

Q. Do you know whether or not he had disposed of any of his property?

Ans. No.

Q. Do you know what the conduct of Mr. Perez was at the time and before that with reference to paying his obligations?

Ans. I think that he was a merchant that did not have many creditors and that he was always solvent.

Cross-examination.

By Mr. CORNWELL:

Q. Did you know that Mr. Perez had mortgaged some of his property for twenty thousand pesos on the 10th of November, 1899?

Ans. No, sir; I did not know.

Q. As a matter of fact, you know very little about Mr. Perez or his business, do you?

Ans. Yes; I am not a merchant and am not supposed to be in intimacy with the commercial affairs of Mr. Perez. I am a doctor and know him personally and know what I hear.

And thereupon, further to maintain said issues, said plaintiff introduced as a witness in his behalf one IGNACIO GONZALEZ, who after being duly sworn, testified as follows:

67 Witness, IGNACIO GONZALEZ, for plaintiff.

(Direct examination.)

By Mr. DEXTER:

Q. What is your name and where do you live?

Ans. Ignacio Gonzalez; I live in Peral street.

Q. In what city?

Ans. In Mayaguez.

Q. Do you know Mr. Perez, the plaintiff in this case?

Ans. Yes.

Q. Do you know Mr. Fernandez, the defendant?

Ans. Yes.

Q. Have you had any conversation with Mr. Fernandez about his bringing an attachment suit against Mr. Perez?

Mr. CORNWELL: I object to that; it is hearsay.
The COURT: It is calling for what your client said; that is not hearsay. Proceed.

Q. was repeated.
Ans. I have seen the embargo on the house but have never had a word with this gentleman about it.
Q. Did you hear Mr. Fernandez make any statements about bringing any attachment suit against Mr. Perez?

Mr. CORNWELL: That is all hearsay, your honor, and I object to it.
The COURT: That is calling for what the defendant may have said. Proceed with the question.

Q. Did you hear Mr. Fernandez make any statement at any time, in your presence, about his going to bring an attachment suit against Mr. Perez?
Ans. No, sir, but I have seen a paper nailed there to the door of Mr. Perez' house. It was in English but I found out after inquiry that it referred to an attachment.

No cross-examination.

And thereupon further to maintain the said issues, said plaintiff introduced as a witness in his behalf, one LUCAS RAMOS, who after being duly sworn testified as follows:

Witness, LUCAS RAMOS, for plaintiff.

(Direct examination.)

By Mr. DEXTER:

Q. What is your name and where do you live?
Ans. Lucas Ramos; I live in Peral street, Mayaguez.
Q. What is your business?
—. I dedicate myself to the commercial line.
Q. How long have you been in business in Mayaguez?
Ans. Ten years.
Q. Are you the Mr. Ramos, formerly of the house of Perez Ramos y Cia.?
Ans. Yes.
Q. How long have you known Mr. Perez?
Ans. From '86.
Q. What was your association with him during the year 1899 and up to January 4th, 1900? Was it intimate or not?
Ans. We were partners.
Q. Do you know whether he transferred any of his properties so as to place them beyond the reach of any of his creditors during that time?
Ans. No, sir.
68 Q. Was Mr. Perez able to pay his debts during that time, do you know?

Ans. Yes; he had several properties and then he had the interest in the house.

Q. Do you know, approximately, what Mr. Perez was worth on January 4th, 1900?

Ans. No, I cannot tell that.

Q. Can't you approximate it?

Ans. No, sir.

Q. Was he good for a debt of 3200 pesos at that time?

Ans. Yes.

Q. So far as you know, and during your association with him had he failed in the payment of his debts during that time?

Ans. No, sir.

Q. Do you know that there was an attachment against the property of Mr. Perez, issued by the provisional court in January, 1900?

Ans. Upon his goods, no; upon his property, a house of his.

Q. Is that the house where the firm was doing business?

Ans. Yes.

Q. Do you know whether or not that attachment has affected the credit of Mr. Perez, and his standing as a business man in this community?

Ans. I cannot say exactly.

Q. You mean to say that you do not know that it has or it has not; you do not know one way or the other?

Ans. I do not know; I cannot say.

Cross-examination.

By Mr. CORNWELL:

Q. Mr. Ramos, please state to the court and the jury if that attachment against Mr. Perez, affaected the credit of the firm of Perez Ramos y Cia.?

The COURT: I do not think that is a proper question. It is not a question of whether the credit of the house was affected, but whether this plaintiff's credit was affected.

And thereupon, further to maintain said issues said plaintiff introduced as a witness in his behalf one JACINTO PEREZ, who, after being duly sworn, testified as follows:

Witness, JACINTO PEREZ, for plaintiff.

(Direct examination.)

By Mr. DEXTER:

Q. What is your name and where do you live?

Ans. Jacinto Perez; I live in Las Marias.

Q. Are you the Jacinto Perez that acquired some land as the heir of Claudio Barros?

Mr. CORNWELL: I object as that is entirely immaterial.

The COURT: It is simply by way of identifying him. Proceed and ask the question.

Q. was repeated.

Ans. Yes, sir.

Q. State whether or not, if you know of your own knowledge, whether or not you or any of the heirs of Claudio Barros authorized Mr. Fernandez to institute any attachment suit against Mr. Perez?

Mr. CORNWELL: I object to that as Mr. Fernandez never instituted any attachment proceeding in the court; it was in the name of somebody else.

The COURT: I do not think that question is proper. Suit was brought in the name of Aguerria, executor, and the court ruled that a foreign executor, without first complying with certain conditions could not sue here.

69 Mr. DEXTER: We want to show that the defendant here never had any authority from anybody to institute such a proceeding.

The COURT: I do not think the question is competent.

Q. Who represented the estate of Claudio Barros?

Mr. CORNWELL: That is immaterial and I object to it.

The COURT: He can ask that question.

Q. Who represented the estate of Claudio Barros?

Ans. I know that Mr. Fernandez sued Mr. Perez for a sum he owed my dead uncle.

Mr. CORNWELL: I ask to have that answer stricken out as it is not responsive to the question.

The COURT: I do not think that is in answer to the question. The suit shows how it was brought.

Mr. DEXTER: I propose to show by this witness that the proper parties, the heirs, the three heirs of Claudio Barros, that none of these people authorized this defendant here to institute such an attachment proceeding.

The COURT: The record shows that this man was an executor in Spain; that is my recollection; that he was in Spain, an executor, and that this suit was brought in his name. I take it that if the man believed in good faith—the defendant here—and did not act maliciously, assuming that he did not, and did not act maliciously, and for proper cause brought the suit in the name of the executor who was in Spain, and believed he had a right to bring it, it seems to me that is not malicious persecution.

Mr. DEXTER: I propose to show in this case that this defendant had no such authority as that; that he knew from a knowledge of the facts that he had no power to bring such a suit, and that he did not represent the sucesion.

The COURT: I will let you prove by this witness if he knows that he did not represent the executor and had no power to act.

Plaintiff excepts.

Q. Do you know whether or not Mr. Fernandez represented the executor of the estate of Claudio Barros?

The COURT: Do not put it "estate." Does he know of his own knowledge whether he represented the executor?

Q. Do you know, of your own knowledge, whether Mr. Fernandez here legally represented the executor?

The COURT: I will not leave this witness to judge of the legality of the representation. Ask him whether the defendant here represented the executor.

Q. Do you know of your own knowledge, whether the defendant in this case, Mr. Fernandez, represented the executor of Claudio Barros?

Ans. According to what Mr. Fernandez told me, he had received a power from Mr. Aguerria, who was the executor of Claudio Barros.

Q. Do you know whether or not any of the heirs had given him any such power or authority?

The COURT: I rule that out; it is not competent. Proceed.

Mr. DEXTER: That is all.

Mr. CORNWELL: No cross-examination.

Court adjourned at 6.20 p. m. until 9 o'clock next morning.

Court met again at 9.15 December 12th, 1901.

70 Mr. DEXTER: I would like to state, your honor, that one of the plaintiff's witness, Lucas Ramos, wishes to be put upon the stand again as yesterday he misunderstood a question asked him and he answered it wrongly.

The COURT: Bring him in.

The witness LUCAS RAMOS, thereupon being recalled, resumes the witness stand and testifies as follows:

By Mr. DEXTER:

Q. Mr. Ramos, yesterday afternoon the following was asked you: Do you know whether or not that attachment has affected the credit of Mr. Perez and his standing as a business man in this community?—to which your answer was: "I cannot say exactly" Is that correct or not?

Ans. I understood that the question referred to the house of Perez Ramos & Company.

Q. What is the character of the answer you desire to make to that question?

Ans. If it refers to the private affairs of Mr. Perez I consider that it may have caused him damages.

Q. Do you know to what extent if any?

Mr. CORNWELL: I object. He was going to ask him but one question and now he is going into another examination. Besides the question is leading and suggestive.

The COURT: The witness is correcting another answer that he

made because he misunderstood the question, and that necessarily leads to another question. I will permit him to answer.

Q. Do you know to what extent, in what way?

Ans. To what sum?

Q. No, no, just in what respect did it hurt the credit or standing of Mr. Perez as a business man?

Ans. I consider that he must have suffered because when a man has his property attached, necessarily he suffers in his credit. I cannot state the amount of the harm done.

Q. State whether or not it was, in your judgment, an important amount or a very small or slight amount?

The COURT: I will overrule that question.

Mr. DEXTER: Then that is all.

Mr. Dexter, for plaintiff, announces that plaintiff rests his case. And this was all the evidence given on behalf of the plaintiff in said cause.

Mr. CORNWELL: On behalf of the defendant we move for a non-suit in this case on the ground that the plaintiff has made no case; has proved no probable cause and no malice.

(The court ordered the jury to retire during the argument for non-suit)

Mr. Cornwell and Mr. Horton argue the motion for non-suit at length, citing Stewart-ex.-Sonnebonne, 8th Otto, S. C. 187-202.

The COURT: I over-rule the motion. I do not care to hear from you Mr. Dexter. The motion is over-ruled. Bring in the jury and let us proceed.

71 Mr. CORNWELL: I ask the court to now permit me to take an exception to the ruling of the court.

The COURT: Enter an exception, Mr. Stenographer.

The defendant thereupon offered certain testimony to maintain the issues on his behalf, but as no error is assigned in regard thereto, the same is not set forth in this bill of exceptions.

And the said parties having concluded and submitted their testimony on the several matters aforesaid, the said judge, before the jury retired to consider of their verdict did then and there of his own motion charge and instruct the jury as follows:

GENTLEMEN OF THE JURY: You have listened, as was your duty, carefully to the investigation of this case, and to the attorneys who have argued it, and the end of it is now approaching. You are to determine it finally upon the facts of the case and the law as given you in charge by the court. There are one or more bystanders on this jury and therefore the court feels compelled to repeat what it has already said several times to some of you, and that is, that the court determines the law of the case; whatever the court says to you is the law of the case that you must accept. It is your province, however, to determine what are the facts in the case—what has been proven by the testimony here. While the province of the court is absolute in determining the law, your province is equally absolute in determining the truth of what has been offered in evidence before

you. In other words, your province is confined to what are the facts of the case from the testimony. You have sworn, gentlemen, that you will try it according to the testimony in the case. Of course, that means that you are not going to be governed by any sympathy, or by any partiality you may have in any outside transaction; and that you are not to be governed by what the attorneys in the case say, either, as to the law or the facts of the case. However learned the attorneys may be, what they say to you is not conclusive, either as to the law or the facts. The object of attorneys arguing a case is that they may detail to you, for you to judge, their recollection of the testimony. They state what they think is the law of the case, and that is to be controlled by the charge of the court to the jury. So you are the judges of the facts of the case—the testimony offered—although this or that attorney may say that this is the evidence or that is the evidence. You are the judges of that and must determine whether the attorneys detail it correctly or not. It is only for the purpose of refreshing your recollection as to the facts that the arguments are allowed, and the views of the different parties are presented to you.

This is an action styled in the law books an "action upon the case." Stated in a different way, it is an action for a malicious prosecution, for the malicious suing out of an attachment—that is, that it was done without proper cause and with malice. It does not really matter whether there was any cause for it, or not—any real cause. The question is whether there was *probable* cause for it, and whether it was done through malice. Now, I need not say to you gentlemen, as to probable cause, what the meaning of that is. The law books have defined that and they say this about it: "The probable cause is the existence of such facts or circumstances as will create the belief in a reasonable mind that the grounds are correct." You understand, without my saying anything further, what is the meaning of "probable cause." It is whether a reasonable
72 being, a man of ordinary faculties, would have acted under certain circumstances in that way. If he would, then the probable cause, existed.

Now, whether malice existed, or not, is a second question in the case. In other words, if there was no probable cause, for the man doing anything, why, you attribute what he did to malice. That is only a presumption of law, however, and is liable to be rebutted by the testimony in the case. It is justly presumed it was done through malice if there was no probable cause. There are a great many of these rules of law that might seem to you, at first blush, that there was no reason in them, but when we look at it and consider them carefully, as a scholar in law has occasion to do, there is reason in all of them. For instance, a rail-road company transports goods, and it transports the owner of the goods. While it is bound to use all reasonable care with the owner—the man—yet it does not have to have the same care with the man as it does with the goods. That looks very singular at first. The railroad is an insurer for the goods but not for the man. You say that the life of a man is worth a great deal more than a box of candy. That is true—a great deal more

than the box of candy—but the box has no mind, no intelligence, and cannot take — of itself, and hence the carrier is bound to take care of it. The owner has some judgment, some intelligence, and hence the law does not make the carrier the insurer of a man, coming, for instance, from Aguadilla.

Where a man sued out an attachment without probable cause, why, judging from the ordinary transaction in life, the law, in its wisdom, says that it is to be presumed—if there is no probable cause—that it was done with malice, for why else should a person sue out an attachment, if there was no probable cause, except through malice?

I say to you it is the law that wherever there was no probable cause—and I use the word "*probable*" and not "*actual*" cause—that is not required—where there is no probable cause for the attachment, the law presumes malice. If, however, gentlemen—and I am laying down some general rules to guide you in this matter—if, however, probable cause did exist for suing out the attachment, it matters not whether there is really malice. For instance, if I have a debt against one of you gentlemen and you are making away with your property fraudulently, although I do not like you, yet, I can sue out an attachment, and it does not matter what malice I may have had when I did it. Where there is no probable cause for suing out an attachment malice is presumed—liable, however, to be rebutted by the circumstances and testimony in the case.

In this instance, the defendant here, Fernandez, as the agent of another party living, I believe, in Spain, sued out an attachment, as he had the right to do under the law, I say that on January 2nd 1900 he, as the agent of another party sued out—and acting for the other party—sued out an attachment against the property of the plaintiff in this suit, Mr. Perez. That attachment was based on this statement that has been offered in evidence (reading from the affidavit filed) "AFFIANT HAS REASON TO BELIEVE THAT THE DEFENDANT INTENDS TO AND WILL FRAUDULENTLY PART WITH OR CONCEAL HIS PROPERTY BEFORE A JUDGMENT CAN BE RECOVERED AGAINST HIM." You will notice that the statement is "he has reason to believe that, etc." I say to you, gentlemen, that if, at the time that the attachment was sued out, on the 2nd day of January 1900, this defendant in this case, Fernandez, had reasonable grounds to believe, from all the circumstances existing, and that have been proven to you, that there was reasonable cause to believe that this Spanish gentleman for whom he was acting would lose his debt unless he took such steps as he did take, and he had the right to take under the law, then he is protected in this suit, and your verdict in that event would be for the defendant.

If, upon the other hand, if you believe that he did not act in
73 good faith; that it was in bad faith—judging from all the testimony and all the circumstances—that there — no grounds for a reasonable man to believe that that debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment, and, although he was only acting for another as agent, it is a tort and a wrong for which he is responsible,

as well as the man he acted for. If there is no reasonable cause to believe he had grounds for an attachment, the law presumes he did it maliciously. That view, however, is liable to be rebutted by all the circumstances and evidence in the case, and you must determine whether—not that there was actual cause for suing it out—but whether, under all the circumstances, he had reasonable grounds to think, as a reasonable prudent man, that there were grounds for suing it out, You are to also determine from the evidence whether that presumption of malice is rebutted by the circumstances in the case. The law creating and keeping in existence the provisional court provided that attachments may be sued out of it upon the grounds that I have read to you and upon which the defendant did sue it out. It is really at last a matter for you to determine under, all the testimony, whether it was done in good faith—whether it was done honestly—and not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out.

I am not going to detail the testimony to you. Upon one side, this plaintiff in this action had lived here for some fifteen years. He had built up a reputation here for good credit. I say to you, if you believe from all the testimony that this attachment was sued out against him without probable cause, and there was malice on the part of Mr. Fernandez in suing it out, then that the plaintiff is entitled to recover whatever damages he has suffered by reason of it. He should recover in such a case: it is right that he should. A man does not build up a reputation in a day or two for credit. He may have an immense amount of money—and an immense estate—and that may give him some credit, but if he does not pay his debts he will not have much credit in the commercial world. It is like building a building—putting one brick upon another until at last you have a good structure. That is worth something to a man—his credit. If he is injured in it without probable cause he is entitled to damages for it—entitled to be made whole. If you believe that this plaintiff had this credit in this community, and that the defendant, without probable cause and with malice sued out this attachment, you should find for the plaintiff whatever you believe from the evidence he has been damaged. In doing that you will consider any injury resulting entirely from the attachment. You will embrace in it loss of time, expenses, either for lawyers or in travelling, or other expenses; and injury to his property or his credit and loss of his business.

Upon the other hand—and I am not going to detail the testimony in this case—the testimony tends to show—and this is subject to your correction,—mind you, this detail of the evidence and you must not hesitate a moment to correct me in any matter and at any time if I fail to detail it correctly, as I do it merely to refresh your memory—I say to you then, gentlemen, that the testimony in this case tends to show that this defendant was acting as agent for a gentleman in Spain, and that he had a debt to collect against Mr. Perez, and the testimony tends to show that he kept that debt on Mr. Perez

for a month trying to make a settlement with him and get security for the debt; that that was not accomplished; finally, on, I believe, November 10th, 1899, or, at any rate some time before and prior to the bringing of this attachment suit--just before the time—he found out that a mortgage had been executed on November 10th
74 1899, by the plaintiff in this suit upon, at least, a part of his property. You have heard it read and you can judge of the testimony. And that he executed the mortgage, which was unregistered. He then very properly, I think, and we all agree, went to a lawyer to know what to do. He detailed to the lawyer the circumstances existing—told him—as the testimony tends to show—about this mortgage; told him of the debt he had; that he was the agent for the other man, and asked him what he should do. The lawyer gave him his opinion. Now, gentlemen, I am not going to tell you that that consultation with the lawyer, and being advised to do that, is an absolute bar to this case, but I am going to say to you that you are to consider all that upon the question as to whether this man acted upon probable cause, without malice, or with malice. The attorney advised him to sue out this attachment and he did so, and the property was levied on. At last, therefore, gentlemen, after having reviewed all this testimony the question is presented to you whether this defendant, Fernandez, acted in good faith, and whether he had ground for the belief, as a reasonable man, that he had cause for suing out this attachment, or, whether he acted in malice and in bad faith. You are to determine simply that question. If you determine that he had no probable cause for suing out this attachment—that it was done through malice, why, then, you ought to find for the plaintiff whatever he has been damaged by reason of it. The sole question is as to the attachment. Allusion has been made to the fact that the court determined that that suit did not lie. That has nothing to do with this case. It is true the plaintiff in this suit could not sue until that other suit was determined, but that suit was determined upon another legal question, and with that you have nothing to do. The question in this case is whether or not this defendant had reasonable cause to believe at the time he sued out the attachment that there was danger the debt would be lost unless he sued out the attachment, or if, he acted with malice. If you believe that he acted as a prudent man and in good faith, believing that he had cause to sue out that attachment, you should find for the defendant. In determining this question you take into consideration all the testimony that has been allowed to be offered before you.

(To the attorneys:)

Gentlemen: I think I have given substantially what each of you has asked.

Mr. DEXTER: In the charge to the jury, your honor, has used the following language: "If Fernandez sued out the attachment as he had the right to do under the law." I ask that the court qualify that by stating "subject to the balance of the charge I have given."

The COURT: Certainly, gentlemen, I mean by that to say that the law simply gave him the right to sue out an attachment if the con

ditions and circumstances existing authorized him to do it. Of course, that is to be qualified by the balance of the charge.

The plaintiff in this case, gentlemen of the jury must—and I will not use language that is sometimes used in cases—but it lies upon the plaintiff to prove his case—not to the exclusion of a reasonable doubt, as in criminal cases, but to prove it reasonably, that is to your belief—to your belief. You will find a verdict in this kind of a case in accordance with the preponderence of the testimony.

75 Gentlemen, that is all I desire to say to you in the case. If you find a verdict for the plaintiff you will say: "We, the jury, find for the plaintiff, and assess damages—so much, whatever it may be," and if you find for the defendant you will say "We, the jury, find for the defendant.

The jury thereupon retired at 2 o'clock and returned at 3.35 and rendered the following verdict:

"We the jury, find for the plaintiff $7000.00 in damages."
(Signed) J. J. GIMENEZ, *Foreman.*

Mayaguez, December 12, 1901."

And inasmuch as the several matters objected to or insisted upon and considered by the court do not appear by the record, the said defendants did on the 5th day of February, A. D. 1902, after the expiration of said term, which adjourned December 12th A. D. 1901, by virtue of a special order and subsequent stipulation between the attorneys of the respective parties made herein extending the time for the filing of the same, proposed this bill of exceptions to the rulings of the said judge, and request him to sign the same as provided by the statutes in such cases made and provided, which after notice to plaintiff's attorney, is signed this 5th day of February, A. D. 1902.

(Signed) WM. H. HOLT,
[SEAL.] *United States District Judge for the District of Porto Rico.*

Endorsement: No. 70. C. L. Mayaguez. In the district court of the United States for Porto Rico. December term, 1901. Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria. Bill of exceptions. Filed clerk's office United States district court February 5th 1902 (Signed) Ricardo Nadal, clerk of the court.

76 And afterwards, to wit, on the 11th day of February, 1902, came the defendant in this suit by his attorneys and filed in the clerk's office of the court aforesaid his certain appeal bond in this case, which said appeal bond is clothed in the words and figures following, to wit:

In the United States District Court for Porto Rico.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and RAFAEL DIAZ AGUERRIA.

Appeal Bond.

Know all men by these presents that we Jose Antonio Fernandez y Perez as principal, and Francisco Crestar and Damian Fernandez as sureties, are held and firmly bound unto Jose Perez y Fernandez, plaintiff above named in the sum of ten thousand dollars ($10000.00) to be paid to the said José Perez y Fernandez, his executors or administrators, to which payment well and truly to be made, we, bind ourselves and each of us jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 27th day of January, A. D., 1902.

Whereas, the above named defendant Jose Antonio Fernandez y Perez has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled cause by the district court of the United States for the district of Porto Rico,

Now therefore, the condition of this obligation is such that if the above named Jose Antonio Fernandez y Perez shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) JOSE A. FERNANDEZ. [SEAL.]
FRANCO. CRESTAR. [SEAL.]
DAMIAN FERNANDEZ. [SEAL.]

CITY OF MAYAGUEZ, *Island of Porto Rico,* } *ss.:*

Francisco Crestar and Damian Fernandez of Mayaguez, Porto Rico, the sureties named in and who signed the foregoing bond, being duly and severally sworn, each for himself deposes and says: That he is worth in unencumbered property not exempt from execution, under the laws of Porto Rico, the sum of ten thousand dollars, after the payment of all just debts, claims and liabilities.

(Signed) FRANCO. CRESTAR.
DAMIAN FERNANDEZ.

Subscribed and sworn to before me this 27th day of January, A. D. 1902.

(Signed) J. A. ERWIN,
[SEAL.] *Ass. Judge of District Court of Mayaguez, P. R.*

(Indorsement:) Jose Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez, and Rafael Diaz Aguerria. Bond. Filed clerk's office United States district court February 11, 1902. (Signed) Ricardo Nadal, clerk of the court.

77 And afterwards, to wit, on the last day aforesaid came the defendant in this case and filed in the clerk's office of the court aforesaid his certain petition for writ of error and supersedeas, which said petition is clothed in the words and figures following, to wit:

In the United States District Court for the District of Porto Rico.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and RAFAEL DIAZ AGUERRIZ.

Petition for Writ of Error and Supersedeas.

Jose Antonio Fernandez y Perez, a defendant in the above entitled cause feeling himself aggrieved by the verdict of the jury and the judgment entered on the 12th day of December, 1901, comes now by his attorneys, Horton and Cornwell, and petitions this court for an order allowing said defendant to prosecute a writ of error to the United States Supreme Court, under and according to the laws in that behalf made and provided, and that upon the defendant's giving a bond in the sum of ten thousand dollars in accordance with the order of this honorable court made he-ein on the 13th day of January, 1902, all further proceedings in this court be suspended and stayed until the termination of said writ of error by the United States Supreme Court.

And your petitioners will ever pray.

(Signed) HORTON & CORNWELL,
Attorneys for Defendant Jose Antonio Fernandez.

Indorsed: Filed clerk's office United States district court, February 11th, 1902. Ricardo Nadal, clerk of court By H. H. Scoville, D. C.

And afterwards, to wit on the same day last aforesaid came the plaintiff in this case by his attorneys and filed his certain motion in the clerk's office of the court aforesaid, which said motion is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.

Motion to Require Appellant to Furnish Other and Better Security.

Now comes plaintiff and his assignee José Gonzalez and moves the court to require defendant to give other and better sureties for the appeal bond herein for the reason that Francisco Crestar and Damian Fernandez have not any visible property or estate and have

not sufficient in amount of any goods or property equal to the amount of the said bond for appeal and supersedeas.

(Signed) JOSÉ B. GONZALEZ.
JOSÉ PEREZ.

José Perez being duly sworn, upon his oath says that the facts set forth are true.

(Signed) JOSÉ PEREZ.

Subscribed and sworn to before me this 10th day of February 1902.

(Signed) RICARDO NADAL, *Clerk.*

(Indorsed:) Filed clerk's office U. S. district court Feb'y 11 1902.

78 And afterwards, to wit, on the last day aforesaid an order was entered on the chancery order book of said court in said cause which said order is clothed in the words and figures following, to wit:

In the District Court of th- United States for Porto Rico.

FEBRUARY 11, 1902.

Present: The Honorable Wm. H. Holt, judge.

JOSE PEREZ Y FERNANDEZ
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ ET AL.

The defendant filed his petition for a writ of error herein to the Supreme Court of the United States and the same is allowed. And he thereupon presented and appeal bond dated January 27th, 1902, and moves its acceptance and approval, to which the plaintiff objected and filed his objection and time is given till February 24th, 1902, for the filing of affidavits relative to the sufficiency of said bond, or within which time the defendant may file a new bond if he so desires.

The defendant files his assignment of errors.

And afterwards, to wit, on the same day last aforesaid, came the plaintiff in error, by his attorneys and filed in the clerk's office of the aforesaid court his certain assignment of errors, in said cause, which said assignment of errors is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSÉ PEREZ Y FERNANDEZ, Plaintiff,
versus
JOSÉ ANTONIO FERNANDEZ Y PEREZ & RAFAEL DIAZ AGUERRIA, Defendants.

Assignment of Errors.

Now comes the plaintiff in error, José Antonio Fernandez y Perez, one of the defendants in the above entitled action, and files the following assignment of errors:

I. That the United States district court in and for the district of Porto Rico erred in overruling the demurrer interposed by this defendant, and plaintiff in error, to plaintiff's declaration filed in said cause.

II. That said court erred in denying the motion for a nonsuit made by this defendant after plaintiff had introduced all his evidence in chief, and before the offering of any testimony on behalf of the defendants, the grounds being specified in said motion.

III. The court erred in rendering a judgment against this defendant alone, he being one of the defendants sued jointly, and no dismissal or nonsuit having been asked for or entered as to the other defendant.

(Signed) HORTON & CORNWELL,
Attorneys for Plaintiff in Error.

Endorsement: In the district court of the United States for Porto Rico. José Perez y Fernandez, pl'ff. *vs.* José Antonio Fernandez y Perez Rafael Diaz Aguerria, def'ts. Assignment of errors. Filed, clerk's office United States district cour- Feb'y 11th, 1902 (Signed) Ricardo Nadal clerk of court.

79 And afterwards, to wit, on the twenty fourth day of February, A. D., 1902, came the defendant herein by his attorneys, and filed with the clerk of the aforesaid court in said cause, his certain bond on writ of error, which said bond is clothed in the words and figures following, to wit:

In the District Court of the United States for the District of Porto Rico.

JOSÉ PEREZ Y FERNANDEZ, Plaintiff,
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ, RAFAEL DIAZ AGUERRIA, Defendants.

Bond on Writ of Error.

Know all men by these presents that we José Antonio Fernandez y Perez, as principal, and Francisco Crestar and Mariano Riera Palmer as sureties, are held and firmly bound unto José Perez y

Fernandez, plaintiff above named in the sum of ten thousand dollars ($10,000.00) to be paid to the said José Perez y Fernandez, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 20th day of February, A. D., 1902.

Whereas, the above named defendant José Antonio Fernandez y Perez has sued out a writ of error to the United States Supreme Court to revere the judgment in the above entitled cause by the district court of the United States for the district of Porto Rico.

Now, therefore, the condition of this obligation is such that if the above named José Antonio Fernandez y Perez shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void: otherwise, to remain in full force and virtue.

(Signed) JOSÉ A. FERNANDEZ. [SEAL.]
FRANCISCO CRESTAR. [SEAL.]
MARIANO RIERA PALMER. [SEAL.]

CITY OF MAYAGUEZ, *Island of Porto Rico,* } *ss:*

On this 21st day of February, 1902, before me personally came José Antonio Fernandez y Perez, Francisco Crestar and Mariano Riera Palmer to me personally — to be the same persons who executed the above bond and duly acknowledged the execution of the same.

(Signed) FRANCISCO B. BASORA,
[SEAL.] *U. S. Commissioner.*

(Indorsements:) Jose Perez y Fernandez *vs.* Jose A. Fernandez y Perez and Rafael Diaz Aguerria. Filed clerk's office United States district court February 24, 1902. Ricardo Nadal, clerk of the court, by H. H. Scoville, D. C.

80 And afterwards, to wit, on the same day last aforesaid came the defendant by his attorney herei and filed in the clerk's office of the aforesaid court in said cause his certain certificate, which said certificate is clothed in the words and figures following, to wit,

Hon. Sr. Alcalde Municipal de esta ciudad:

El que subscribe vecino propietario de esta ciudad, ante Ud. respetuosamente expone; que para usos que le interesan necesita que por esa Alcaldia se le expida certificacion creditiva de las fincas con su número de cuerdas que en el año 1900 á 1901 figura Don Marian Riera Palmer en los barrios de Miradero, Algarroba y Sabanetas.

Mayaguez 20 de Febrero 1902.

Respetiosamente

(Signed) JOSÉ A. FERNANDEZ.

Mayaguez 20 de Febrero 1902.—Expídase la certificacion que se interesa por Secretaría.

[SEAL.] (Signed) M. FAJARDO, *Alcalde.*

Don Ramon Irizarry Ursulich, Secretario del Honorable Ayuntamiento de la Ciudada de Mayaguez Certifico:

Que Don Mariano Riera Palmer figura como contribuyente en el reparto municipal de 1900 á 1901, con las siguientes fincas.

Barrio de Algarrobo Setenta cuerdas y tres cuarta.

Id. de Miradero Treinta y nueve cuerdas.

Id. de Sabanetas cuarenta y tres cuerdas y cuarta.

Y para entregar al solicitante expido la presente que firmo con el V. B. del Señor Alcalde, en Mayaguez á 20 de Febrero de 1902.

(Signed) RAMON IRIZARRI.

[SEAL.]

V. B.

M. FAJARDO, *Alcalde.*

Pago el impuesto un dollar.

[Municipal Treasurer's Seal.]

(Signed) SALUSTIANO COLLADO.

Indorsed: C. L. 70. Mayaguez. Perez *vs.* Fernandez. Certificate of alcalde of Mayaguez. Filed clerk's office United States district court February 21, 1902. Ricardo Nadal, clerk of court by H. H. Scoville D. C.

And afterwards, to wit, on the same day last aforesaid, an order was entered upon the chancery order book of the court aforesaid in said cause, which said order is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

FEBRUARY 24TH, 1902.

Present: The Hon. Wm. H. Holt, judge.

81 JOSÉ PEREZ Y FERNANDEZ *vs.* JOSÉ ANTONIO FERNANDEZ Y PEREZ. } C. L. #70.

Order.

The defendant presented a new bond herein and moved the approval and acceptance of same, it being accompanied by a notarial certificate and a certificate of the officers of the *officers of the* municipality of Mayaguez. And the court not being advised sufficiently and thinking it proper the other side should have opportunity of objecting if it desire, the further hearing of the matter is adjourned

till February 25, 1902, at 10 o'clock a. m., said bond and papers being filed.

(Signed) WM. H. HOLT, *Judge.*

And afterwards, to wit, on the twenty fifth day of February, A. D., 1902, an order was entered on the chancery order book of the court aforesaid in said cause, which said order is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

FEBRUARY 25, 1902.

Present: The Honorable Wm. H. Holt, judge.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.

Order.

The defendant by his attorneys, Horton and Cornwell, renew-d his motion for approval of bond tendered herein, to which the plaintiff's assignee, J. B. Gonzalez, by his attorney, F. H. Dexter, objects and by consent the further hearing of the matter as to the sufficiency of the bond is set for hearing March 5th, 1902, at 10 o'clock a. m.

The plaintiff also enters a motion for an order vacating the supersedeas sought to be obtained herein and for the granting of an execution and same is set for March 5, 1902, at 10 a. m., and said motion in writing is now filed.

(Signed) WM. H. HOLT, *Judge.*

And afterwards, to wit, on the same last day aforesaid, came the plaintiff, by his assignee and attorney herein, and filed in the clerk's office of the court aforesaid in this cause, his certain motion for execution, which said motion is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.

Motion for Execution.

Now comes José Perez y Fernandez, by and through José B. Gonzalez, the assignee of the judgment herein, and moves the court for an order vacating the supersedeas sought to be obtained herein, and the granting of an execution for the following reasons, to wit:

1st. Because no writ of error has been sued out, signed or sealed as required by law, and within the time specified by statute in such cases made and provided.

2nd. Because a writ of error has not been served upon
82 plaintiff or his assignee, by lodging a copy thereof in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained.

3rd. Because security has not been given as required by law.

4th. Because no citation has been issued and served as required by law and practice in such cases.

5th. Because the writ of error and the proceedings therefor have not been perfected within the time necessary in order to secure a supersedeas of the judgment herein entered.

(Signed) F. H. DEXTER,
Attorney for Plaintiff's Assignee.

Endorsement: José Perez y Fernandez *vs.* José A. Fernandez y Perez. Motion for execution. Filed clerk's office United States district court February 25, 1902. (Signed) Ricardo Nadal clerk of court H. H. Scoville, D. C.

And afterwards, *to wit*, on the fifth day of March, 1902, came the defendant, José Antonio Fernandez y Perez, by his attorneys herein, Horton and Cornwell, and filed in the clerk's office of the court aforesaid, his certain affidavit of sureties, in the said cause, which said affidavit is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

JOSÉ PEREZ Y FERNANDEZ, Plaintiff,
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ and RAFAEL DIAZ AGUERRIA, Defendants.

Affidavit of Sureties.

CITY OF MAYAGUEZ, } ss:
District of Porto Rico, }

Francisco Crestar, and Mariano Riera Palmer, residents of Mayaguez Porto Rico, the sureties named in and who signed the supersedeas bond in the above entitled case, being duly and severally sworn, each for himself deposes and says: That he is worth in property not exempt from execution under the laws of Porto Rico, in excess of the sum of ten thousand dollars, after the payment of all just debts, claims and liabilities.

(Signed) FRANCO. CRESTAR.
MARIANO RIERA PALMER.

Subscribed and sworn to before me, this first day of March 1902, in the city of Mayaguez, Porto Rico.

[SEAL.] (Signed) FRANCO. B. BASORA.

83 (Indorsement:) C. L. No. 70. José Perez y Fernandez *vs.* José Antonio Fernandez y Perez and Rafael Diaz Aguearia Affidavit of sureties. Filed clerk's office United States district court (Signed) Ricardo Nadal clerk of the court.

And afterwards, to wit, on the same day last aforesaid there was issued out of the clerk's office of said court a certain writ of error directed to the judge of the United States district court for the district of Porto Rico which said writ of error, is clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the district court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said United States district court before you between José Antonio Fernandez y Perez, plaintiff in error and José Perez y Fernandez, defendant in error, *and* manifest error hath happened to the great damage of the said José Antonio Fernandez y Perez, as by his complaint appears. *That* being willing that error, if any hath been, be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and there under your seal, distinctly and openly, you send the records and proceedings aforesaid, and all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 5th day of April 1902, next, — the said Supreme Court to be then and there held, that the record and proceedings aforesaid be inspected, *and* the said court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States this 5th day of March, A. D., one thousand nine hundred and two.

[SEAL.] (Signed) RICARDO NADAL,
Clerk United States District Court for District of Porto Rico.

Allowed March 5, 1902, by:
(Signed) WM. H. HOLT,
District Judge.

Service of this writ of error and receipt of copy thereof is hereby admitted this 5th day of March 1902.

———,
Attorney for Defendant in Error.

84 (Indorsement:) José A. Fernandez y Perez, plaintiff in error *vs.* José Perez y Fernandez, defendant in error. Writ of error. Filed clerk's office United States district court March 5th 1902. Ricardo Nadal, clerk of the court.

And afterwards, to wit, on the same day last aforesaid came the marshal of this district and returned the aforesaid writ of error into the clerk's office of said court, with his proceedings thereon in the words and figures following, to wit:

Return on Service of Writ.

UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

I hereby certify and return that I have served the annexed writ on the therein named José Perez y Fernandez by handing to and leaving a true and correct copy thereof with F. H. Dexter attorney for defendant in error personally at San Juan in said district on the 5th day of March, A. D. 1902.

(Signed) E. S. WILSON,
U. S. Marshal.

And afterwards, to wit, on the same day last aforesaid there was issued from this United States district *district* court for Porto Rico aforesaid a certain writ of citation directed to José Perez y Fernandez, which said citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to José Perez y Fernandez:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Porto Rico wherein José Antonio Fernandez y Perez is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 5th day of March A. D., 1902, and of the Independence of the United States the one hundred and twenty sixth year.

(Signed) WM. H. HOLT,
[SEAL.] *United States District Judge.*

Attest:
(Signed) RICARDO NADAL, *Clerk.*

(Indorsement:) José Antonio Fernandez y Perez, plaintiff in error vs. José Perez y Fernandez, defendant in error. Citation. Filed clerk's office United States district court. March 5th 1902. (Signed) Ricardo Nadal, clerk of the court.

Marshal's fees 1 service $2.00

And afterwards, to wit, on the same day last aforesaid came the marshal of this district and returned the said writ of citation into the clerk's office of said court, with his proceedings thereon in the words and figures following, to wit:

Return on Service of Writ.

UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

I hereby certify and return that I have served the annexed citation on the therein named José Perez y Fernandez by handing to and leaving a true and correct copy thereof with F. H. Dexter, attorney for plaintiff in error personally at San Juan, P. R. in said district on the 5th day of March A. D., 1902.

(Signed) E. S. WILSON,
U. S. Marshal.

And afterwards, to wit, on the 10th day of March, 1902, there was entered on the chancery order book of the court aforesaid in this cause a certain opinion which said opinion is in the words and figures following, to wit:

86 In the District Court of the United States for Porto Rico.

MARCH 10, 1902.

JOSÉ PEREZ Y FERNANDEZ }
vs. }
JOSÉ ANTONIO FERNANDEZ Y PEREZ. }

Opinion.

The defendant, José A. Fernandez, asks the bond tendered by him herein on February 24th, 1902, be approved and that his writ of error to the United States Supreme Court be held to operate as a supersedeas, suspending the collection of the judgment until the determination of the appeal. The plaintiff moves to vacate the supersedeas sought to be obtained and for an order granting execution upon the judgment.

If the writ of error which the defendant has sued out does not operate as a supersedeas, then the motion to vacate is unnecessary.

Section 1007 of the Revised Statutes of the United States provides that if a defendant desires to stay process upon a judgment he must serve his writ of error by lodging a copy of it in the clerk's office for the adverse party and giving bond within sixty days after the rendition of the judgment or afterward by permission of a judge of the appellate court. He must do these two things within said time, the only qualification being that having served his writ of error within the time he may give the security after the lapse of the sixty days provided a justice of the appellate court gives leave to do so.

The verdict was returned on December 12, 1901. The motion for a new trial was overruled and judgment entered upon the same day. The defendant, by an order, obtained time until January 15, 1902, to file a bill of exceptions. This was extended until February 1, 1902, by an order made in chambers on January 13th, 1902, by virtue of a stipulation of the parties. At the same time upon the defendant's motion, but not by consent, the amount of a supersedeas bond, that he proposed to give, was fixed at ten thousand dollars.

87 January 29th, 1902, a stipulation of the parties was filed agreeing to a further extension of time to file a bill of exceptions, to wit, until February 5th, 1902, and an order to this effect was made in chambers. Upon the last named date the bill was approved and filed.

February 11th, 1902, a petition for a writ of error was filed and *it* allowed. An appeal bond in the sum aforesaid was then presented by the defendant; the plaintiff filed written objections to the sufficiency of the sureties and time was given until February 24, 1902, to show the sufficiency of the same or to give a new bond. Upon the day last named the defendant presented a new bond, and made the motion now under consideration. No writ of error was ever served or lodged in the clerk's office until March 5th, 1902, some 83 days after the judgment.

The court is disposed to allow the writ to operate as a supersedeas, but has been unable, after a diligent examination of authorities, to see its way to do so.

The supersedeas is by a statutory provision and a strict compliance with it is necessary.

The service of the writ of error within sixty days from the rendition of the judgment is an indispensable requisite to its operation as a supersedeas. The court has no discretion in the matter. It is required by the statute. It is a compliance with its provisions that makes the writ so operate. If the necessary steps are taken the writ becomes *per se* a supersedeas. The latter is an incident of it if there is a compliance with the provisions of the statute.

The lodging of a copy of the writ in the clerk's office within ten days after the judgment was required by the judiciary act of 1789 in order that the writ might operate as a supersedeas.

Railroad Company *vs.* Harris, 7 Wall., 574.

By the act of 1872 the time was extended to sixty days.

Kitchen *vs.* Randolph, 3 Otto, 86.

The proper justice can give indulgence as to giving the security, but not as to the service of the writ; as to it the party must be prompt. The writ of error removes the case to the appellate

88 court; it is jurisdictional, while the citation notifies the adverse party that it has been done. It is a matter of law whether the writ operates as a supersedeas, and not a matter within the court's discretion. It might, perhaps, make a *nunc pro tunc* order as to it that would be effective if the delay were owing to the

action of the court, or had been for its convenience; but this is not the case.

The court has considered if by any stipulation or action of the parties there has been any waiver that would authorize it to sustain the defendants' motion; but none appears.

If the writ is not served nor the bond tendered within the sixty days, a party may, of course, still sue out his writ of error or appeal at any time within the appeal limit of time by giving bond for the costs, but the writ will in such case not operate as a supersedeas.

The bond in this case is approved, as of February 24th 1902, but it cannot operate as a supersedeas, and an order to this effect will be entered.

(Signed) WM. H. HOLT, *Judge*.

Endorsement: In the district court of the United States for Porto Rico. José Perez y Fernandez *vs.* José Antonio Fernandez y Perez Opinion. Filed clerk's office United States district court, March 10th, 1902 (Signed) Ricardo Nadal clerk of the court By H. H. Scoville, D. C.

89 And afterwards, to wit, on the last day aforesaid, there was entered in the chancery order book of the court aforesaid in this cause a certain order which said order is in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

MARCH 10TH, 1902.

Present: The Honorable Wm. H. Holt, judge.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ. } Order.

The bond heretofore tendered in this case is approved as of that date, to wit, February 24th, 1902, but the writ cannot operate as a supersedeas.

(Signed) WM. H. HOLT, *Judge*.

90 And afterwards to wit, on the last day aforesaid, there was filed by the plaintiff's assignee, through his attorney herein, in the clerk's office of the court, his certain præcipe for *for* execution which said præcipe is — the words and figures following, to wit:

Pracipe for Execution.

In the District Court of the United States for Porto Rico, Mayaguez.

JOSÉ PEREZ Y FERNANDEZ
vs.
JOSÉ ANTONIO FERNANDEZ Y PEREZ.

Clerk of the court:

Please issue execution at once against defendant, above named, José Antonio Fernandez y Perez, in favor of José B. Gonzales, assignee of plaintiff José Perez y Fernandez, to collect judgment and costs in the above entitled cause.

(Signed) F. H. DEXTER,
Attorney for Plaintiff's Assignee.

March 10—1902.

Endorsement: José Perez y Fernandez *vs.* José Antonio Fernandez. Præcipe for execution. Filed clerk's office United States district court, March 10th, 1902. (Signed) Ricardo Nadal, clerk of the court.

And afterwards, to wit, on the — —— there was issued out of the clerk's office aforesaid our writ of execution in this case directed to the marshal of this district and against the said defendant, which said writ is clothed in the words and figures following to wit:

91 THE UNITED STATES OF AMERICA, *District of Porto Rico,* } *ss:*

The President of the United States of America to the marshal of the district of Porto Rico, Greeting:

You are hereby commanded, that of the goods and chattels, and for want thereof, then of the lands and tenements of Jose Antonio Fernandez y Perez in your district, you cause to be made the sum of seven thousand dollars damages and eighty-seven dollars costs of suit, which, by the judgment of the district court of the United States for the district of Porto Rico, at the December term thereof, in the year 1901, Jose Perez y Fernandez recovered against the said Jose Antonio Fernandez y Perez with interest thereon from the 12th day of December A. D. 1901, until paid, together with the further sum of — costs of increase on said judgment; and also the costs that may accrue on this writ.

And have you the said monies in the said district court, before the judge thereof, at the city of San Juan, in said district, within sixty days from the date of this writ, to be paid to the persons entitled to receive the same. And have you then and there this writ.

Witness the Honorable William H. Holt, judge of the district court of the United States for Porto Rico, this tenth day of March

A. D. 1902, and in the 126th year of the Independence of the United States of America.

(Signed) RICARDO NADAL, *Clerk.*

92 And afterwards to wit; on the 24th day of March, 1902, there was filed by the defendants herein in the clerk's office of the court aforesaid in this cause their certain motion to quash execution and set aside judgment, which said motion is clothed in the words and figures following, to wit:

In the United States District Court in and for the District of Porto Rico.

José Perez y Fernandez, Plaintiff, *vs.* Jose Antonio Fernandez y Perez and Rafael Diaz Aguerria, Defendants.	Motion to Quash Execution and Set Aside Judgment.

Now comes Jose Antonio Fernandez y Perez, one of the defendants herein and moves the court to quash the execution and set aside the judgment entered in the above entitled cause, for the following reasons.

I. That the judgment entered in this cause against this defendant Jose Antonio Fernandez y Perez is invalid and void upon the face of the records in this cause, this being a suit against two defendants sued jointly and no dismissal or non-suit having been entered prior to the judgment in said case as to the other defendant Rafael Diaz Aguerria.

II. That the judgment entered in this cause against this defendant is invalid and void upon the face of records in this cause, in this, to wit: that the verdict of the jury "We the jury find for the plaintiff in the sum of $7000.00 damages" did not authorize or permit a judgment to be entered against one of two defendants, declared against in plaintiff's declaration, there having been no dismissal or non-suit asked for or entered as to the other defendant.

(Signed) HORTON & CORNWELL,
Attorneys for Jose Antonio Fernandez y Perez.

Endorsement: C. L. Entered Order Book page 96. José Perez y Fernandez *vs.* Jose Antonio Fernandez y Perez *et al.* Motion to quash execution and set aside judgment. Filed clerk's office United States district court, March 24th, 1902. Ricardo Nadal, clerk of the court. By (signed) H. H. Scoville, D. C.

93 And afterwards to wit on the last day aforesaid, there was filed by the defendants herein in the clerk's office of this court in this cause their certain notice of motion to quash execution and set aside judgment, which said notice is clothed in the words and figures following, to wit:

In the United States District Court in and for the District of Porto Rico.

JOSE PEREZ Y FERNANDEZ, P'tff, *vs.* JOSE ANTONIO FERNANDEZ Y PEREZ and Rafael Diaz Aguerria, D'f'd'ts.	Notice of Motion to Quash Execution and Set Aside Judgment.

To Frank H. Dexter, Esquire, attorney of record for José Perez y Fernandez, plaintiff in the above entitled action:

Please take notice that on Wednesday, the 26th day of March A. D. 1902, at 10 o'clock a. m. or as soon thereafter as can be heard the undersigned will move this court, at chambers in the city of San Juan for an order to quash the execution and to set aside the judgment entered in the above entitled cause for the following reasons:

I. That the judgment entered in this cause against this defendant Jose Antonio Fernandez y Perez is invalid and void upon the face of the record in this cause, this being a suit against two defendants sued jointly and no dismissal or non-suit having been entered prior to the judgment in said case as to the other defendant Rafael Diaz Aguerria.

II. That the judgment entered in this cause against this defendant is invalid and void upon the face of the records in this cause in this to wit: That the verdict of the jury "We the jury find for the plaintiff in the sum of $7000. damages" did not authorize or permit a judgment to be entered against one of the defendants declared against in plaintiff's declaration, there having been no dismissal or non-suit asked for or entered as to the other defendant.

(Signed) HORTON AND CORNWELL,
Attorneys for José Antonio Fernandez y Perez.

Endorsement: In the United States district court for Porto Rico. C. L. 70. Perez y Fernandez *vs.* Fernandez y Perez and Diaz Aguerria. Notice to counsel on motion to quash execution etc. Filed clerk's office United States district court March 24, 1902. (Signed) Ricardo Nadal clerk of the court.

94 And afterwards, to wit, on the 27th day of March, 1902, there was entered on the Mayaguez chancery order book of this court in this cause a certain entry which said entry is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

MARCH 27TH, 1902.

Present: The Honorable William H. Holt, judge.

JOSE PEREZ Y FERNANDEZ, Pl'tiff.
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and Rafael Diaz Aguerria, D'f'd'ts.
} On Motion to Quash Execution and Set Aside Judgment.

The defendant Jose Antonio Fernandez y Perez on this day at chambers called up his motion filed herein on March 24th, 1902 which is as follows, to wit:

Now comes Jose Antonio Fernandez y Perez, one of the defendants herein and moves the court to quash the execution and to set aside the judgment entered in the above entitled cause for the following reasons:

I. That the judgment entered in this cause against this defendant Jose Antonio Fernandez y Perez is invalid and void upon the face of the record, in this cause, this being a suit against two defendants jointly and no dismissal or non-suit having been entered prior to the judgment in said case as to the other defendant Rafael Diaz Aguerria.

II. That the judgment entered in this cause against this defendant is invalid and void upon the face of records in this cause, in this to wit: That the verdict of the jury "We the jury find for the plaintiff" in the sum of $7000. damages," did not authorize or permit a judgment to be entered against one of two defendants declared against in plaintiff's declaration there having been no dismissal or non-suit asked for or entered as to the other defendant.

(Signed) HORTON AND CORNWELL,
Attorneys for Jose Antonio Fernandez y Perez.

To which the plaintiff objected and the motion is submitted.

And afterwards to wit*h*, on the 2nd day of April 1902 there was entered upon the Mayaguez chancery order book in this cause a certain opinion herein which said opinion is in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

APRIL 2ND, 1902.

Present: The Honorable William H. Holt, judge.

JOSE PEREZ Y FERNANDEZ, Pl'tiff.
vs.
JOSE ANTONIO FERNANDEZ Y PEREZ and RAFAEL DIAZ Aguerria, D'f'd'ts.
} Opinion.

95 This is a motion, upon notice to the other side, to set aside a *a* judgment upon a verdict rendered at the December term 1901 of this court at Mayaguez, and to quash the execution

thereon. It is made at chambers, and after the expiration of the term. Each side has been heard. No grounds to quash the execution is presented save that the judgment should be disregarded or set aside. Not only has the term expired but a writ of error has been sued out and the case is now bound up in an appeal. It is elementary that a court has, after the expiration of the term, no power over its judgments. This rule is so well established that numerous citations of authorities is unnecessary. A judgment of a court, however conclusive, is during the term at which it is rendered, subject to its order. After the term is ended, however, it is beyond its control. If erroneous, it can be corrected only by an appeal. By the common law writ of error *coram vobis* some material matter that had been overlooked, as the death of a party before a trial or infancy without the appointment of a guardian, the coverture of a party or clerical error in the process, could be brought before the court. This is however now generally done by motion supported by affidavit, but if there be error on the part of the court rendering a judgment; error in its action, it cannot be reached by motion after the end of the term. It is then beyond its power.

104, Otto, 410,—Bronson *vs* Schulten.

If a judgment be void, as for want of jurisdiction, or because the court has exceeded his power, as for instance in a suit upon a note the debtor has been sent to the penitenciary, then it may subsequently to the term at which it was rendered, afford relief upon motion and hold it void. But this judgment is not void and the motion must be overruled. Such an order will be entered.

(Signed) WM. H. HOLT, *Judge.*

And afterwards, to wit, on the same day last aforesaid there was entered upon the Mayaguez chancery order book of this court in this cause a certain order herein which said order is in the words and figures following, to wit:

In accordance with the foregoing opinion the motion to set aside judgment and quash execution is now over-ruled.

96 UNITED STATES OF AMERICA, *District of Porto Rico,* } *ss:*

In the District Court of the United States for the District of Porto Rico.

JOSE PEREZ Y FERNANDEZ, Plaintiff, *vs.* JOSE ANTONIO FERNANDEZ Y PEREZ and Rafael Diaz Aguerria, Defendants. } C. L. 70. Mayaguez. Trespass on the Case for Wrongful Attachment.

I, Ricardo Nadal, clerk of the district court of the United States in and for the district of Porto Rico, do hereby certify the foregoing ninety five type-written pages, numbered from 1 to 95, inclusive, to

be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of recor- and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said district court this third day of April, A. D. 1902.

[Seal United States District Court for the District of Porto Rico.]

RICARDO NADAL,
Clerk United States District Court of Porto Rico.

96½ [Endorsed:] José Antonio Fernandez y Perez and Rafael Diaz Aguerria appellants in error *vs.* José Perez y Fernandez appellee.

Endorsed on cover: File No. 18,527. Porto Rico D. C. U. S. Term No. 323. Jose Antonio Fernandez y Perez, plaintiff in error, *vs.* Jose Perez y Fernandez. Filed May 5th, 1902.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 8 1904
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

[redacted]

No. [redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

JOSE ANTONIO FERNANDEZ Y PEREZ, *Plaintiff in Error,* *vs.* **JOSE PEREZ Y FERNANDEZ.** *Defendant in Error.*	No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATE FOR THE DISTRICT OF PORTO RICO.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This record is an example of the looseness and confusion in judicial as well as administrative procedure that seem necessarily to attend and characterize the formative period following a change of sovereignty and the establishment in an old country of a new system of government. But it seems to present with sufficient clearness the questions to which it is proposed briefly to direct the attention of this court.

The case is brought here upon a writ of error to the United States District Court for the District of Porto Rico, and presents for review a judgment of $7,000 entered in that court on December 12, 1901, against the plaintiff in error.

The action was "trespass on the case for wrongful attachment," and was brought by the defendant in error to recover damages which he claims to have suffered as a result of an attachment writ levied, at the instance of the plaintiff in error and his co-defendant in the lower court, upon a two-story house in Mayaguez then belonging to the defendant in error. The averment is that the attachment was levied "without probable cause."

Besides some traveling and other expenses claimed by the defendant in error to have been made in preparing his defense to the attachment proceeding, the damages especially complained of by him, as a result of the attachment of his property, is the alleged impairment of his reputation and credit as a merchant. A notice of the attachment was posted on his property and this, he alleges, produced damage to his standing in his community.

The further facts in the case are as follows: The defendant in error, José Perez y Fernandez, as he admits upon this record, had owed about $6,000 pesos to one Claudio Barros. (Rec., 38.) The latter died, leaving a will in which Raphael Diaz Agueria, one of the defendants in the court below, was named as executor. The will was probated in Spain and Agueria duly appointed executor of the estate of the decedent. The larger part of the estate seems to have been located in Porto Rico, and Agueria, although a Spaniard, seems to have been a resident of that island. (Rec., 1.)

The defendant in error, Perez, without making any arrangement for paying the indebtedness due to the estate of Barros, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for $20,000 pesos. (Rec., 18.) The instrument seems to have embraced all the real estate that he owned in the island. (Rec., 51.)

This transaction came to the knowledge of the executor, Agueria, a few weeks afterwards, and as the mortgage did not contain any provision for the payment of the debt due to the estate that he represented, he took alarm and, acting under advice of counsel, caused an attachment writ to be issued and levied upon the house at No. 10 Peral street, Mayaguez, belonging to the defendant in error. (Rec., 13.) The property was included in the mortgage and the writ therefore only reached the equity in it. (Rec., 21.)

The attachment proceeding was commenced on January 2, 1900, in a military court established by the United States military authorities and called "The United States Provisional Court for the Department of Porto Rico." But beyond the serving of the usual summons upon the defendant, the levying of the writ and the posting of the notice on the premises as above alluded to, the proceeding seems to have gone no further. It was in fact subsequently dismissed, after it had been stayed by injunction proceedings in the United States District Court at the suit of one Jacinto Perez Barros, heir of the deceased Claudio Barros. The ground upon which the injunction was issued was that Agueria, the plaintiff in attachment, who sued as executor under a will probated in Spain, had not taken out ancillary letters in Porto Rico, and therefore was not authorized in the latter jurisdiction to collect by judicial process the $5,000 pesos due to the estate of the decedent.

The plaintiff in the attachment suit, Raphael Diaz Agueria, as above stated, sued as the executor of the will of Claudio Barros. (Rec., 30.) But the affidavit in attachment was sworn to by José Antonio Fernandez y Perez (Rec., 31) as the agent of Agueria, and on its face it appears that he was acting only in that capacity.

In bringing his action to recover damages for the alleged wrongful attachment the defendant in error not only made Agueria and his agent, José Antonio Fernandez y Perez, joint defendants in the action (Rec., 2), but the act complained of against them is set up as a joint tort. Summons was served on the latter, but although Agueria, as stated in the declaration (Rec., 1), was a resident of Porto Rico, the marshal's return on the summons was that he was "unable to find the within named defendant, Raphael Diaz Agueria, within my district." Nor does it appear that any further effort was made to obtain service upon him.

The agent, Fernandez y Perez, appeared by his attorneys and demurred to the declaration, which demurrer was overruled by the court. He then pleaded and the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's testimony the defendant asked for what was doubtless intended as a peremptory instruction to the jury to find for the defendant. His motion was overruled and this ruling is now assigned as error. At the conclusion of all the testimony the court instructed the jury, and although Agueria had not been served *and the cause had not been dismissed as to him*, the case was allowed to go to the jury against the agent only. A verdict in general terms—"We, the jury, find for the plaintiff $7,000 in damages" (Rec., 76)—was brought in, and judgment was subsequently entered upon it against José Antonio Fernandez y Perez, only.

On the motion for a new trial one point urged was (Rec., 24) that "the verdict of the jury has no evidence to support it and is so far contrary to the evidence as to shock the moral sense."

An examination of the record will disclose that this is not an exaggerated statement of the matter. There is some testimony by the defendant in error as to the expenditure of $1,200 pesos in traveling expenses. There was no cross-examination on this point, but in this small island of only forty miles in width and less than one hundred miles long such an expenditure seems incredible and its imposition upon the plaintiff in error a miscarriage of justice. (Rec., 46.)

After the attachment notice had been posted on the premises by the officer, contrary to the local law, which requires the writ of "provisional seizure" of real property to be filed with the registrar of deeds (Code of Civil Proc., Art. 1407, p. 281), no other step seems to have been taken by either party. The business of defendant in error was not taken charge of and he was not dispossessed. Only a notice of the attachment was posted on the premises in English in the midst of a Spanish speaking people. "It was in English," says Gonzalez (Rec., 67), "but I found out *after inquiry* that it referred to an attachment." But if the marshal had filed the notice with the registrar, as the law required, instead of posting it, it would doubtless have escaped the notice even of the inquiring Gonzalez. And it was soon defaced by the rain. (Rec., 50.) A simple motion to dissolve the attachment on the technical ground afterwards raised by a stranger to the record in a suit in equity, would have terminated the proceeding, and have removed the rain stained notice. But nothing was done by way of defense, except

that the defendant in error seems to have kept himself constantly on the road, traveling back and forth, and rolling up an extraordinary bill for traveling expenses, which subsequently were imposed upon the plaintiff in error. There is also some testimony—not explained in detail or with exactness—as to extraordinary fees paid to lawyers *"and for a great many other things"* (Rec., 46)—not explained—in connection with his defense, although the record does not disclose that the lawyers took any steps at all to relieve the defendant of the embarrassment to him arising, as alleged, from the notice in English posted on the premises.

It is apparent, however, that the case proceeded on the theory that the gravamen of the action, in the mind of the defendant in error, was the alleged damage to his reputation and credit resulting from the attachment suit against him. The limit of the claim for traveling and other expenses was $5,000. (Rec., 47.) The verdict therefore includes at least $2,000 for alleged injury to his credit and standing. And as to this issue there was practically no evidence to sustain the verdict.

It is not to be expected that this court will examine this record with a view to the reversal of the judgment on the ground that the verdict is not supported by the weight of the evidence. But as indicating the general character of the result attained by the operation of a court of justice in this case, and on the ground that there was no evidence even tending to support the contention that his reputation and credit have been injured, the writer ventures to summarize briefly the evidence offered by the defendant in error. The testimony when examined fails to a singular degree to lend the slightest support to that averment.

Mr. Bravo (Rec., 59) simply expressed the opinion that "a case like that" always affects a merchant "in some way or other." Mr. Koberg, when asked whether the credit of the defendant in error had been hurt seriously or slightly, replied, "I cannot say that. I do not know that." (Rec., 62.) Mr. Phillipi several times stated that the credit of the defendant in error was *not* hurt by the attachment suit (Rec., 63), and even when pressed by counsel stated that he did not know whether it was affected or not and that he had no opinion on the question. (Rec., 64.) The witness Koester said that his credit was hurt "just to a certain extent," but he was not able to state how much. (Rec., 65.) Mr. Font said that he was a doctor and not a merchant and did not know about such matters; but his "understanding" was that an attachment against a merchant must injure his credit. Mr. Gonzalez saw the notice on the house. (Rec., 67.) It was in English, and as he was of an inquisitive turn of mind, he took steps to ascertain its meaning and learned that it referred to an attachment. But did not venture any opinion as to its effect upon the credit and standing of the defendant in error. Mr. Ramos, when asked whether the attachment affected the credit and standing of the defendant in error, said, "I do not know, I cannot say." (Rec., 68.) When recalled in order again to testify on the same point, he said (Rec., 71): "I consider that he *must* have suffered, because when a man has his property attached necessarily he suffers in his credit. I cannot state the amount of the harm done."

These witnesses were all called by the defendant in error and no other witness testified for him on this point or on any other point. The defendant in error himself said, in relation to the alleged injury to his credit, that his partner-

ship was not injured because it never asked for credit. As to himself (Rec., 43) he said: "It is positive that my credit suffered greatly." But the only instance that he endeavors to give as a proof of the assertion is, that he wrote one Villamil & Co. for a loan of $2,000 and never got an answer. (*id.*) But he admits that he never was personally refused credit by anyone. After the Spanish speaking neighbors saw the English notice on the house "*I did not dare ask anybody*" for credit. (Rec., 43.) The attachment did not result in the presentation of bills and claims against him by his creditors. He says: "They did nothing, *but they were doubtful.*" (Rec., 50.) But the firm of Fritze, Lundt & Co. did collect a note *from his partner* that had long been overdue and unpaid. (Rec., 50.)

The record is absolutely bare of any other proof that tends even by intimation to show that the attachment did any harm to the good name of the defendant in error. And this court will not overlook the fact that the attachment was dissolved and the case dismissed not because it had been wrongfully issued—the debt was due from the defendant in error and he had by mortgage on all his real estate secured another large creditor to the exclusion of the estate of Barros—but only upon a technical incompetency on the part of the plaintiff in the action to bring suit in Porto Rico.

I.

THE COURT INSTRUCTED THE JURY ERRONEOUSLY AS TO PROBABLE CAUSE.

The rule is that the question of what constitutes probable cause is one of law or of mixed law and fact. It may be

left to the jury to determine whether certain facts exist as alleged, but it is for the court alone to determine whether those facts, if found to exist, do or do not amount to probable cause.

Stewart v. *Sonnebonne*, 98 U. S., 187.
Sanders v. *Palmer*, 55 Fed., 217; 5 C. C. A., 77.
Bulkeley v. *Keteltas*, 6 N. Y. (2 Selden), 384.
Bulkeley v. *Smith*, 2 Duer, 261.
Besson v. *Southard*, 10 N. Y. (6 Selden), 236.
Masten v. *Deyo*, 2 Wend., 424.
Baldwin v. *Weed*, 17 Wend., 224.
McCormick v. *Sisson*, 7 Cowan, 715.
Hutchinson v. *Wenzel*, 155 Ind., 49.
Sutton v. *Johnstone*, 1 Term. Rep., 493 at 545.
Panton v. *Williams*, 2 Adol & Ell N. S., 169 at 192.

On this point of probable cause it is obvious that the court left it to the jury to determine whether the defendants did or did not have probable cause for the prosecution of the attachment suit. This was erroneous. In the case of *Stewart* v. *Sonnebonne, supra*, this court said:

> "It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility and what facts it proves, *with instructions that the facts found amount to probable cause, or that they do not*. There may be, and there doubtless are, some seeming exceptions to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove probable cause is involved. What their belief was is always a question for the jury."

Judged in the light of the above language, the instruction given by the District Court was manifestly erroneous.

It did not inform the jury in the slightest degree as to what facts would amount to probable cause. It detailed the evidence tending to prove certain facts, but it did not indicate that those facts, or any of them, if true, would show that probable cause existed or did not exist. The jury should have been told "If you find that thus and so was done, and that the defendant believed this and that, then he was justified in beginning the attachment suit, but if you find certain other facts, then he was not justified." Such an instruction was given by Brewer, J., in *Blank* v. *A. T. & S. F. Ry. Co.*, 38 Fed., 311 at page 314. But the instruction in this case is very different. It says (Rec., 73, 74):

> "If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith; * * * that there were no grounds for a reasonable man to believe that the debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment. * * * It is really at last a matter for you to determine * * * not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out. * * * *If you determine that he had no probable cause for suing out this attachment*—that it was done through malice, why then you ought to find for the plaintiff whatever he has been damaged by reason of it."

The jury were asked, in effect, whether or not they thought the defendants were justified in bringing their attachment suit. Even if the plaintiff's evidence be taken as true, the question of whether or not those facts as found amounted to a probable cause, was one for the court and not for the jury. As is said by Judge Duer in *Bulkeley* v. *Smith*, *supra*, the judge "must instruct the jury that if the facts shall be found by them in a certain manner, they do or

do not amount, as the case may be, to a want of probable cause. * * * If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but, also whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error."

This was exactly what the presiding judge in the lower court did—he abjured his own functions. He let the jury determine that the facts showed a want of probable cause. His own opinion, after listening to the evidence as expressed in the record, was, that the plaintiff in error had probable cause for bringing the action in attachment and was not guilty of malicious prosecution. His remarks on the point, set forth confusedly in the record, are substantially as follows (p. 69):

> "My recollection is, that this man, in whose name the suit was brought, was appointed an executor in Spain. I take it that if the defendant here did not act maliciously but believed in good faith that there was proper cause for bringing this suit in the name of the executor and believed that he had a right to bring it—it seems to me that that is not malicious prosecution."

Although error has not been assigned on the instruction, the writer has ventured to direct the attention of the court to it because of the obvious character of the error that it involves and in order by a reference to the cases from American sources to emphasize the fact that it proceeds or was intended to proceed on common law principles and in complete disregard of the local jurisprudence.

II.

THE COMMON LAW IS NOT IN FORCE IN PORTO RICO AND THE JUDGMENT ENTERED HEREIN IS VOID FOR LACK OF JURISDICTION IN THE LOWER COURT TO ENTERTAIN SUCH AN ACTION.

It is assumed that this court will take judicial notice of the fact that the body of laws and system of local government in force in the Island of Porto Rico at the time of its occupation by the American troops were the laws and form of government enacted and established for it by the Kingdom of Spain. It is also assumed that judicial notice will be taken of the course of legislation since the occupation, with a view to determining what changes in the body of laws have taken place. It may properly be asserted therefore that the Spanish system of laws and not the common law of England was in force in that island during the Spanish dominion. And the writer knows of no statutory authority under which the common law may be said to have been extended there since the sovereignty over it was transferred to the government at Washington. On the contrary, the organic act expressly provides that the local laws shall continue in force.

If therefore, as appears clearly upon this record, the United States District Court for the District of Porto Rico, in cases that come before it, is enforcing the principles of the common law in that island without statutory authority and in disregard of the local jurisprudence, the question of its power to do so would seem to belong to that class of jurisdictional questions that may be raised in this court either by the parties to the proceeding or by the court itself, although

not raised in the lower court or preserved by exception upon the record. Such a question seems to be entirely analogous to the questions of jurisdiction suggested for the first time on appeal in

Smith v. *Rice*, 11 Mass., 507, at p. 513.
Riley v. *City of Lowell*, 117 Mass., 76.
Fowler v. *Eddy*, 110 Pa. St., 117.
State v. *Richmond*, 6 Foster's Rep., 239.
Mansfield, etc., R. R. Co. v. *Swan*, 111 U. S., 379.
Campbell v. *Porter*, 162 U. S., 478.
Morris v. *Gilmer*, 129 U. S., 315, and in similar cases.

The point is now made therefore, that the lower court in entertaining this form of action and in hearing and deciding the issues between the parties in accordance with the principles of the common law of England and in disregard of the local laws, pleading and practice, then in force, was exercising a jurisdiction that did not belong to it, and the judgment rendered was therefore void and should be set aside.

In presenting this question to the court it seems proper first to allude briefly to the character of the local jurisprudence.

The penal and civil codes of Spain and codes of civil and criminal procedure, its celebrated mortgage law and law of notaries, together with the code of commerce and law of waters, and its provincial and municipal systems of local government, form a jurisprudence and a system of administration as highly refined as those enjoyed by any of the civilized nations. Under these laws an organized social and political life was maintained in Porto Rico, and foreign and domestic commerce was sustained on a stable basis.

The foundation of the Spanish codes was of ancient origin and in their present form, as promulgated in 1889 for Spain and its colonial possessions, they were the result of generations of experience and were thought to be especially suited to the temperament and condition of Spanish speaking people whether living in the Peninsula or in its colonies. They were the product of the history, traditions, education and environments of Spaniards. And from an academic standpoint they had established for themselves a high place among students of jurisprudence. Mr. Leve, an eminent French jurisconsult, who recently translated the Spanish civil code into French, upon a comparison between it and the Code Napoleon, reached the conclusion that the former was the more scientific and complete. (See Note page 107, Walton's Civil Law of Spain.)

And the Congress of the United States, recognizing the completeness of the Spanish system of laws then in force in Porto Rico, and believing that they were well adapted to the conditions there existing, provided, in the Act of April 12, 1900, establishing a civil government for the island, that they should continue in force until changed by the local legislature.

But although the local legislative assembly is clothed with power by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, that is continued in force by the organic act (Sec. 15), nevertheless, so far as the general body of municipal law is concerned, neither Congress nor the military authorities nor the subsequent insular legislative assembly has made any substantial change. For convenience and to relieve the budget of unnecessary burdens, the American military authoritites, by military order signed by the general in command, legislated certain officials and

boards out of existence and modified and re-arranged the jurisdiction of certain other officials and official bodies. There was also some military legislation of a general character tending to simplify government and to prepare the people for the establishment by Congress of a form of government more in harmony with American traditions. But the laws of property and the general laws that controlled the daily life of the people and their relations with one another were left substantially unchanged and remain so to this day.

The legislative assembly, however, has not been inactive in the adoption of institutions and systems recognized as typically American in character. It has provided, for instance, a general system for the taxation of real property substantially on lines familiar to all property owners in the states and territories. It has enacted a general election law. The laws in relation to public schools have been reformed and municipalities have been authorized to levy taxes for school purposes. New police and sanitary measures have been enacted; and laws are to be found on the statute books prohibiting gambling in its various forms, and providing for the closing of commercial establishments on Sunday. A lawful rate of interest has been established and a new law for the incorporation of companies enacted. The right of a trial by jury has been granted. A political code has been adopted defining and limiting the powers of the executive branch of the government. And since the action now before this court was instituted, a new penal code and code of criminal procedure of American origin have been adopted; the civil code has been re-written with certain but unimportant amendments. Moreover, a new code of civil procedure of American origin is at this moment under consideration by

the legislative assembly. The people of Porto Rico have therefore shown a commendable zeal and promptness in adapting themselves and their laws to the new conditions. But, as heretofore indicated, the body of the Spanish laws touching real property and the rights of persons and things; in other words, those laws upon which property and personal rights are based and which govern the individual in his daily life and intercourse still remain practically as they were during the Spanish dominion.

An examination of pages 1 to 298 of the volume published in 1902 and known as the "Revised Statutes and Codes of Porto Rico," will disclose the new law referred to above, enacted, as heretofore explained, in the interest of public health and in relation to elections, education, cemeteries, police courts, jury trials, insular police, municipalities, public property, appropriations, etc., etc. But with the exception of the act establishing a lawful rate of interest, the Revised Statutes show practically no amendment of the old Spanish law or any new enactment affecting the contractual or commercial or personal relations of citizens and residents of the island.

It thus appears that there has existed and still exists in the Island of Porto Rico an elaborate and complete system of laws under which the people of Porto Rico, at the time of the American occupation, were and are now sustaining an organized community in all its various phases. These laws enter into and form an intimate part of the daily life of the people and control and regulate their intercourse among each other. The merchants and property owners and others are familiar with them and relations between citizens are adjusted and controlled by them. Moreover,

the Spanish code of civil procedure, together with the code of criminal procedure, with apparently unnecessary elaboration, afford ample means by which citizens of Porto Rico and all persons residing within its jurisdiction may have their wrongs redressed, whether committed against property or the person, and may assert and enforce their rights and demands. Thus in the Island of Porto Rico, which has been wholly free from those local disorders that have occurred and still do occur with such frequency among other Spanish speaking people, there has existed and still exists a system of justice complete in all its details. And so satisfactory has this system been to Porto Ricans and to aliens dwelling in the island, that the legislative assembly, created for it by the Congress and clothed with full legislative powers, has left the laws practically unaltered, so far as they touch the individual person, property rights and commercial relations.

But the United States District Court for the District of Porto Rico seems practically to have discarded the local body of laws as an aid and guide in the administration of justice between litigants that invoke its jurisdiction. Its processes, its pleading and practice, and its judicial conclusions are founded upon unwritten laws wholly unknown to the Porto Ricans, who are accustomed only to the *written* law as found in the various codes enacted by the Spanish authorities. When brought before the Federal Court citizens of Porto Rico are told that their controversies—on the law side as distinguished from suits in equity, which, of course, stand on a different footing—are to be adjusted in accordance with the principles of the common law of England. In other words in the case now before this court, a controversy between two Spanish speaking

residents of Porto Rico had to be litigated in accordance with the unwritten law of English speaking people, the principles of which are to be found only in court reports and law books printed in a language unknown to them.

The legal authority for this course, ~~of~~ or the practical motive for its adoption, contrary to the practice of Federal courts in the States, have never been explained to Porto Ricans, so far as the writer has been informed. Nor can they understand why a system of law unknown to them should be imposed upon them. Unfamiliarity with the civil law on the part of the presiding judge of the lower court may suggest the explanation, but it affords no excuse or legal authority for causing a whole people to stand in awe of its process and to remain helpless when brought before it, because the rules and principles of this law are locked up in a multitude of books printed in a language that they cannot even read. The local Spanish laws, on the contrary, are all available in English, and in each of the five insular trial courts is an American judge of common law education and training. Two members of the insular Supreme Court are Americans. These judges have found no difficulty in administering justice in accordance with the local laws in force. And a growing American bar practices before the insular courts with ability and success. Nor have the American officials of the insular government or a large American population had any trouble in adjusting themselves to the local system.

The result of this state of affairs in the United States District Court for the District of Porto Rico is that the native bar of Porto Rico, which includes in its ranks many members of wide cultivation and learning, is practically excluded from representing its own people in that court.

And two systems of law, based upon different principles and often producing widely different results, as in this case, are enforced by the insular and Federal courts.

All the pleadings appearing upon this record and all the orders, forms and proceedings are drawn in accordance with the requirements of the common law, or were so intended. The charge of the court to the jury is based upon common law principles although erroneously stated. He explains to the jury that the action is "styled in the law book *an action upon the case.*" (Rec., 72.) This form of action is unknown in the local practice, and the law books referred to are legal treatises upon the common law of England and have no relation to the laws of Spanish origin then in force in the island and then controlling these two Spanish litigants. He instructs the jury (Rec., 72, 73) as to "probable cause" and "implied malice" exactly as if the cause of action had arisen in England or in the State of Illinois or in the District of Columbia, where the common law is in force. Moreover, the record indicates (p. 16) that the lower court entertains actions in replevin. Other official publications of Porto Rico show that it issues writs of garnishment (1 Op. Atty.-Gen. of P. R., 159), which is commonly understood to be a statutory remedy. It issues writs of attachment, also a statutory writ. But neither of these writs is authorized or known in the local laws, although they contain elaborate and ample provisions for accomplishing the same general results.

The archives of this court doubtless contain records in other cases showing the exercise by the lower court of a general common law jurisdiction. At any rate, it is the common knowledge of those that have had opportuntiy to know, that the United States District Court for the District of

Porto Rico, in all cases that come before it, not of an equitable nature, exercises a common law jurisdiction exactly as do the Federal courts in common law states like Illinois, and that in so doing it practically excludes from consideration not only the local system of pleading and practice, but also the principles that underlie the local system of laws. It entertains all the ordinary actions, whether of common law or statutory origin, as if the court sat in a common law state. The statement is made with all proper reservations, but it is the recollection of the writer that it has entertained jurisdiction in actions to recover damages for personal injuries at a time when no such civil action was possible under the local law.

Although it has been intimated that the Kentucky statutes are the *vade mecum* of the learned judge who presides in the lower court, the writer ventures no conjecture as to the source of his authority for issuing writs of replevin, garnishment and attachment. Certain it is that they are not issued out of that court in conformity with the local law, which have elaborate provisions for accomplishing the same results. So far as attachments are concerned, under Section 915 of the Revised Statutes of the United States, the Federal Courts seem to have no authority to issue such writs except by the adoption of the attachment laws of the state in which they hold court. And the "provisional seizure" law in force in Porto Rico is a most admirable and complete attachment act. (Code Civil Proc., Title XIV, p. 278.)

Now, is there any authority in law for the adoption by the United States District Court for the District of Porto Rico of the common law system of pleading and practice and for the enforcement of the common law as the basis of the

exercise of its judicial functions? The organic act provides (Sec. 8, Act of Congress of April 12, 1900):

> "That the laws and ordinances of Porto Rico, now in force, shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by Act of Congress of the United States."

The same act provides in section 14, as follows:

> "That the statutory laws of the United States *not locally inapplicable*, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

And in section 34, creating the United States District Court for the District of Porto Rico, it provides that it shall have,

> "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and *shall proceed therein in the same manner as a circuit court.*"

The effect of the provisions of section 8 seems undoubtedly to be to fix the local laws as the sole basis of all rights and remedies, not of a Federal character, arising in Porto Rico, in whatever court they may be asserted, exactly as the jurisprudence of any state of the United States is the basis for the enforcement, in the Circuit Courts of the United States, of all similar rights and remedies arising therein.

And with equal confidence it is asserted that one effect of sections 14 and 34, above quoted, is to extend to Porto Rico all the Federal laws that limit and define and otherwise relate to the Federal Judiciary and to require the United States District Court for the District of Porto Rico, in all civil actions that come before it, to proceed in conformity with local laws, exactly as it would be compelled to do if sitting as a United States Circuit Court in a state of the United States. No other meaning can be attributed to the language of these sections. And it is not conceivable that the Congress of the United States intended or has made it possible for the Federal court sitting in that island to impose upon the people of Porto Rico not only a system of pleading and practice with which they are entirely unfamiliar, but to impose upon them principles and precepts of a system of law entirely different from that in force in their own local courts. Such a course might have been appropriate in the early days of the western territories when their population consisted of frontiersmen, hunters and Indians. And, Congress having created a court to administer civil justice in such a territory, it might be said, in the absence of any other provision by Congress relating to the matter and in the absence of an adequate local system of laws, practice and pleading to which such a court might conform, to have an inherent power to adopt some system in order to pursue and carry out the ends of justice for which it was established. But if such an inherent power would exist under such conditions, it is earnestly contended that Porto Rico is not a proper place for its exercise. For it is not a pioneer country, sparsely settled, like Alaska and some of the western territories in which the local laws are of an elementary and simple character. On the contrary,

for some generations it has had a dense population, all the walks of life being filled to overflowing. Its commercial and agricultural enterprises are conducted on a large scale; its schools and hospitals are numerous; its banks are well organized, and its commerce and trade well established. It not only has a larger population than some of the states of the United States, but the community and its public institutions are organized on a much broader basis than in many of the states. And its system of laws is much more full and elaborate and more carefully co-ordinated than those of almost any state of the United States.

Moreover, if such inherent power can be said to exist in a court created for a territory sparsely settled and without established institutions and laws—and this need not be denied—clearly such a power cannot be exercised when Congress has affirmatively determined, as it has for Porto Rico, that the local system of laws is adequate for all purposes, and has affirmatively provided, as hereinabove stated, that all the local laws and ordinances shall continue in force. (Sec. 8, *supra.*) This means not only that the local laws and ordinances shall be respected by the people of the island and those dwelling within it, but that they shall be respected by the United States District Court as well. And this affirmative declaration by Congress of the sufficiency of the local system of laws and this provision that they shall continue in force would seem necessarily to withhold from that court any inherent power of setting them aside and substituting another system in their place. The people of the island should be relieved from the hardship and embarrassment that daily follows from the application and enforcement in that court of a system of law with which they

are wholly unfamiliar and whose precepts and rules are not to be found in a language that they can now read.

The language of the section of the Foraker Act creating and referring to the United States District Court for the District of Porto Rico, would seem to leave no doubt in the mind that the intention of Congress was that that court should bear to Porto Rico the same general relation that the Federal courts do to the several states in which they sit, and to perform the same general functions, and to have the same general though slightly enlarged jurisdiction. That being so, it seems impossible to arrive at the conclusion that, under section 14 (*supra*), the lower court is not governed by the sections of the Revised Statutes that relate to and control the Federal Judiciary in all their functions. Those sections of the Revised Statutes are not "locally inapplicable" from any point of view that has yet been suggested by anyone.

Section 914 of the Revised Statutes of the United States provides that:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, *shall conform*, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*"

And although all the local laws and codes of procedure have been officially translated into English by the government at Washington, and are therefore readily accessible and are now in constant daily use in the insular courts by American officials, judges and lawyers, the United States District Court has discarded them, and as heretofore stated, permits its jurisdiction to be invoked in civil causes only upon common law principles and in common law actions or in

statutory actions ordinarily provided in common law states, and upon common law pleadings and in accordance with the common law practice. There is not only no conformity to local practice, pleadings, modes and forms, but there is no pretense of an effort to conform. The lower court in the causes before it does not "proceed therein in the same manner as a circuit court," as required in Section 34 of the Foraker Act. It pursues a course of its own without an effort at conformity "as near as may be" or otherwise.

It seems proper at this point to consider the particular case presented by this record for the purpose of ascertaining the difference between the results that followed the application of the common law and the results that would have followed had the local law been applied.

As heretofore indicated, the law of torts is a branch of purely *civil* remedial justice of limited application in the Spanish jurisprudence, although there is in the Civil Code of Spain a certain modified recognition of the principle that a wrong done creates an obligation to recompense the person injured. The provision of the *civil* code in force in Porto Rico at the time involved in this record is as follows (see War Dept. Trans., p. 244):

> "Art. 1902: A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to *repair* the damage done."

This seems to be the only general clause authorizing damages in a *civil* action for what in the common law is called a tort. In Chap. 3, Tit. 18, at p. 252 of the same translation, will be found a statute of limitations in which the several different clauses of civil actions under the Spanish code are enumerated and the time prescribed during which they may be instituted. The only form of civil action appearing in

this enumeration, under which such a wrong as the one alleged upon this record may be redressed, is the one referred to in Art. 1902 (*supra*). The chapter of which it is a part is entitled "Obligations Which Arise From Fault or Negligence," and pertains to Book IV of the Civil Code (p. 145). This book treats altogether of "obligations" in their various forms, whether created by law, by contract, by unlawful acts or omissions or by negligence or fault. And in case of damage resulting from an act or omission not punished by the penal law, Art. 1093, p. 145, provides that the claim of damages shall be subject to the provisions of Art. 1902, referred to and quoted above. That article, therefore, seems to be the only clause in the *civil* code that has relation to such a case as this record presents. And it provides only for the "*repair*" of the damage done.

The writer has been unable to find available here for reference the Spanish treatises relating to the subject, and he has therefore expressed his views in these pages with some reservation. It is believed however that it will be found to be a well settled doctrine in the Spanish jurisprudence, that damages may be recovered in an exclusively *civil* action only when the injury done is of a *material* character capable of being definitely valued, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case the damage must be "*repaired.*" In plain English it must be "made good." For example, a wagon destroyed or a house injured through negligence must be restored by the careless author of the damage or the cost of its restoration must be paid for by him. Again, a person physically injured in an accident due to negligence, may recover the value of his suit of clothes or money or other property on his person destroyed

or lost *in* the accident. He may recover the money *actually expended* by him after the accident for medical attendance and drugs. He may recover for any other damage of a *material* nature that is capable of being exactly valued and was the ~~material~~ result of the injury. But for the loss of his limb or injury to his health or similar resulting consequence of the negligence, which is not capable of exact and definite valuation, the *civil* action alone is not sufficient to afford him redress. The Spaniard resents the theory that his leg may be valued in a merely civil proceeding and a money compensation awarded to him for its loss without a criminal prosecution. He resents the theory that he has a *civil* action for damages for the death of a member of his family through the negligence of another. The person guilty of negligence producing results so grave must be punished criminally. And he entertains the same objection to a money valuation in a civil action for damages to his reputation or dignity through the wrongful act of another. If a slander or libel or, as expressed in the Spanish laws, a calumny or insult, results in the loss of a definite employment to which is attached a definite salary, he may recover damages under the Spanish code in a civil action. But for the indefinite damage to his reputation, credit or standing in the community not capable, like an employment with a salary attached, of exact valuation, a *civil* action alone will not suffice. Another illustration of the same principle will be found in Article 44 of the Civil Code (p. 11), which limits damages in actions for breach of promise of marriage to the actual expenses incurred by the disappointed party by reason of the promise. For the indefinite damage to the feelings, reputation, etc., the civil code offers no redress.

With respect to libel and slander the Spanish law during

the time involved in this record, did not permit a *civil* action to recover damages for injured reputation, credit, etc. Subsequently it was modified by the legislative assembly of Porto Rico, in an act entitled "An act authorizing civil actions to recover damages for libel and slander," approved Feb., 19, 1902. (Rev. Stat. of P. R., p. 214.) The first section of this act provides that:

> "The *civil* action for damages for libel and slander *is hereby established.*"

This language is important as indicating the legislative understanding of the general absence from the Spanish jurisprudence of what in the common law is known as an action in tort.

Substantially the same language is found in Section 3 of the act entitled "An act in relation to the liability of employers for injuries sustained by their employes while in their service." Approved March 1, 1902. (Rev. Stat. of P. R., 150.) Until the passage of this act there was no *civil* action under the laws in force in the island for the recovery of damages for personal injuries or death resulting from the negligence of another. There was only a civil action, as hereinbefore indicated, for damages of a material nature capable of definite valuation, such as the loss in the accident of a suit of clothes or a watch, or other wearing apparel. The intangible, indefinite damage to the person injured, resulting, for example, from the loss of a leg or arm, or the permanent impairment of his health and strength, could only be adjusted as an incident to a criminal prosecution. And that the civil action for damages for personal injuries involved a new principle in Porto Rico, will readily appear from an examination of the act itself, which is characterized by a conservatism and caution in establishing the action and

in keeping it within reasonable limitations that does much credit to the insular legislature. The two acts mentioned establishing civil actions for damages for libel and slander and personal injury are the only exceptions that the writer now recalls to the general statement hereinabove made that the general body of Spanish laws has not been materially altered since the American occupation.

The theory of the Spanish law seems to be that injuries that result in damages of an indefinite and intangible nature incapable of exact valuation, such as the loss of a limb, death of a member of the family, impairment of health, strength, credit, dignity, honor, reputation and the like, are so grave as to require the criminal punishment of the author as the primary consideration, and as an incident to the criminal proceeding the person causing the injury, *if found guilty criminally,* may, apparently, as a sort of additional penalty, be required to indemnify the person injured. Such injuries are included in the criminal code as acts to be punished like crimes and misdemeanors. And in order to recover damages it is absolutely necessary under the Spanish law that the author *must first be found guilty in the criminal proceeding.* It is referred to in the penal code as a civil liability, but it is an incident only to the criminal proceeding (Art. 650, p. 157, Crim. Proc.), and cannot be adjudged against the author of the damage except in the criminal proceeding, and only after the existence and punishable character of the act has been judicially determined.

Article 1092 of Book IV (*Civil* Code, p. 145),[1] treating of obligations, provides:

"Civil obligations, arising from crimes or misde-

1 All the references here made to Spanish Codes are to the official War Department translations.

meanors, shall be governed by the provisions of the *penal* code."

And even when the injuries are caused by negligence and not by a malicious and intentional act, if they impair the health or reputation, or result in the loss of life or limb or in any intangible harm of that nature that cannot be exactly valued, the gravity of the result seems to require punishment in a criminal proceeding and, as an incident to it, the adjustment of the damages to be paid the injured person.

With reference to acts not essentially malicious or criminal the provision of the Spanish *penal* code (Ch. *"Misdemeanors* against the person," pp. 125-7) is as follows:

> "Art. 613: The following shall be punished with a fine from 15 to 125 pesetas and censure * * * 5. Those who, *through mere imprudence or negligence,* without committing a violation of the regulations, shall cause an injury which, *if done with malice,* would constitute a crime or misdemeanor."

This provision defines as an act punishable criminally, as a misdemeanor, what in the common law would be a mere tort. And the lower court, in charging the jury that in the absence of probable cause the law would *imply malice* on the part of the plaintiff in error in suing out an attachment writ, was describing what in the Spanish law would seem to be punishable like a crime. (Art. 613, *supra.*)

Again, at p. 129, the *penal* code classifies as an act punishable criminally, as a misdemeanor, what in common law would be a mere tort. The provision is as follows:

> "Art. 626: Those who intentionally *or through negligence or carelessness* shall cause any damage whatever not punished in this or the preceding book, shall be punished with a fine, etc."

(Neither of these two articles is intended to cover *reckless* negligence, which is treated of in Art. 592.)

The Spanish law provides (Penal code, p. 17):

> "Art. 16: Every person criminally liable for a crime or misdemeanor is also civilly liable."

And so every conviction for murder, theft, arson, slander, negligence, etc., as a matter of course is attended by an additional penalty in the way of damages awarded to the injured person. It is included in the judgment entered in the criminal proceeding (§§ 4 and 5, Art. 142, p. 51, and Art. 742, p. 182, Crim. Proc.) and is enforced by execution like a civil judgment. (Art. 133, Penal Code.) But this civil liability is of such nature that it can be demanded only as an incident to the criminal proceeding. The civil demand must be brought jointly with the criminal action (Art. 108, Crim. Proc.), and if the defendant is acquitted of the criminal charge the judgment absolves him necessarily and as a matter of law from the civil liability also. On the other hand, if the defendant be found guilty of the criminal charge, the civil liability follows as a matter of course.

It will thus be seen that at the time when the attachment writ complained of in this record was issued there was no such thing in Spanish jurisprudence as a *civil* action sounding in tort, except with respect to injuries of the material nature hereinbefore referred to. And when the lower court entertained this civil action to recover damages for injury to the credit and standing of the defendant in error it simply legislated into existence a form of legal liability that was unknown in Porto Rico and that was thoroughly opposed to the policy of the local jurisprudence. And it is believed that in all the history of Spanish judicial activity no such judgment as the one here involved will be found. The defendant in error in a civil action in the form required by the local law might have recovered proper traveling ex-

penses and possibly lawyer's fees. These could be definitely ascertained, although no effort to do so has been made in this case. But for the indefinite and intangible damages arising from the alleged injury to his standing and credit the local law afforded him no redress by an exclusively civil action such as this record presents.

Formerly it was held in England that if the crime amounted to a felony, the civil remedy of the injured person was merged in the felony, or, as stated in *Higgins* v. *Butcher,* 1 Yelv., 89, referring to the death of a servant from assault:

> "It has now become an offense to the crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before (the death); his action is thereby lost."

This theory seems afterwards to have been abandoned and in its place was substituted the rule that the trial of the civil action must be suspended until after the offender has been prosecuted for the felony. Lord Ellenborough said in *Crosby* v. *Leng,* 12 East., 409:

> "The policy of the law requires that before the party injured by any felonous act can seek civil redress for it, the matter shall be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution."

In the United States however it seems that the rule requiring the offender to be tried before a civil action is allowed has not been generally accepted, the conclusion now

reached being that the civil remedy is in no way dependent upon the criminal prosecution.

Quimby v. *Blackley*, 63 N. H., 77.
Hyatt v. *Adams*, 16 Mich., 188.

But under the Spanish law in force in Porto Rico at the time here involved, the civil liability was so far dependent upon the criminal proceeding that it not only could not be determined in advance of the trial of the offender, but, as heretofore shown, civil damages could not be awarded against the person charged except upon his conviction in the criminal proceeding; and if acquitted he was absolved from any civil demand.

If this liability be considered as a purely civil obligation, it nevertheless does not become such, under the Spanish law, until the act itself has been judicially determined to exist and to be punishable under the penal code. Such determination must precede either the legal existence of such a liability or any attempt to enforce it. If found to be not punishable there is no civil liability; if punishable the civil liability follows as a matter of course. Such was the law in force in Porto Rico at the time in question, and it must be recognized by the Federal court.

Section 721 of the Revised Statutes of the United States, which is not "locally inapplicable," provides:

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in which they apply."

It matters not that the policy of the law of Porto Rico differs from the law of torts commonly in force in the states of the United States. Such difference does not permit the

lower court to set aside the federal statute just cited and by judicial action to legislate into the jurisprudence of Porto Rico a new principle of law. As was stated in *Hartford Fire Insurance Company* v. *Chicago, etc., R. R. Co.*, 175 U. S., 91, at p. 100, questions of public policy affecting the liability for acts done, are governed by the laws of the state as expressed in its own statutes, unless contrary to the constitution, or to some federal statute of controlling force.

It may be contended however that if the United States District Court for the District of Porto Rico endeavors to conform to the local law with respect to acts resulting in injuries to others, it will be ousted of its jurisdiction in cases where the requisite diversity of citizenship exists. For obviously that court cannot enforce the penal code of Porto Rico. It cannot convict under the insular penal code and then proceed as the insular courts would do, to ascertain the amount of damages to be adjudged. And if the civil liability, so-called, is dependent upon a previous adjudication that the act complained of is punishable under the penal code, it may be said that the lower court could never administer justice in cases that otherwise would properly be before it. It is not necessary, however, to pursue this question to its ultimate analysis and to ascertain whether the so-called civil liability is purely criminal or purely civil. If purely criminal it does not come within the jurisdiction of the lower court. If purely civil in character, the United States Distrial Court for the District of Porto Rico in taking jurisdiction and administering justice between the parties, could at least first determine that the act resulting in the injuries complained of is such an act as would be punishable under the penal code of Porto Rico. It could determine this not with a view to the criminal punishment of the author of it,

but for the purpose of ascertaining whether a civil liability exists. If not so punishable under the law in force no civil liability could be adjudged against the defendant; if so punishable, the lower court could proceed to ascertain the extent of the damages to be awarded. The failure of the lower court in some form to judicially ascertain whether the act complained of upon this record occurred and was of such character as to render the author of it liable to punishment under the local penal code, leaves undecided the question of essential importance, under the well established policy of the law, for determining whether a civil liability exists. This question was not considered upon this record. The lower court was exercising a common law jurisdiction in this case as in all others, and the local law had been set aside as not controlling in that court.

There is one other phase of this question of the failure of the lower court to enforce the local laws and the substitution in their place of the common law that must be referred to briefly.

There seems to be no federal attachment act, but under section 915, U. S. Rev. Stat., plaintiffs are entitled to the same remedies by attachment in the Federal courts that they would be entitled to if suing in a state court. And the Federal courts are given power by general rules to adopt the state laws in relation to attachment.

Now, as has been stated before, section 1 of Title 14 of the Spanish Code of Civil Procedure, p. 278, entitled "Provisional Seizures," is in fact an elaborate and effective attachment act. Among other of its provisions there will be found in article 1411, p. 282, one under which the court, upon vacating an attachment for a cause such as the one involved in this record, has the power, in the attachment

proceeding, to award a judgment against the plaintiff for costs and for the losses and damages that he may have suffered.

This provision in the article last quoted is not permissive only, but seems to be mandatory, and the power conferred by it resembles very closely the power enjoyed by a chancellor of entering a decree for damages upon the dissolution of an injunction. This article in the local law seems to be entirely adequate for adjusting any demand for damages of the character claimed by the defendant in error in this case. The law provides that the adjustment shall be made in the proceeding itself and be included in the ruling vacating the attachment. Articles 1413 and 1414 contain provisions of the same general nature. In addition it is provided in section 933 U. S. Rev. Stat. that attachments shall be dissolved in conformity with the local laws.

Here then was a provision in the local law apparently intended to permit the court, as upon the dissolution of an injunction, to ascertain and award damages upon vacating an attachment. And there seems to have been no other exclusively civil action or process for recovering damages. But the jurisdiction of the lower court under this provision of the local law was not invoked when this attachment was vacated. The whole attachment act and the entire local system of laws are disregarded in that court and the common law and statutory actions generally provided in common law states are followed instead.

The judgment should be reversed.

Respectfully submitted.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 2 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ,
Defendant in Error.

No. 1.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF PORTO RICO.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR. FILED PURSUANT TO ORDER OF DECEMBER 5, 1904.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ,
Defendant in Error.

No. 1.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

ADDITIONAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This case was brought here upon a writ of error to the United States District Court for the District of Porto Rico. Briefs were filed and the case was orally argued before this court during the fall of 1904. Subsequently on December 5, 1904, an order was entered as follows:

> No. 6 *Jose Antonio Fernandez y Perez, plaintiff in error, v. Jose Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:
>
> 1. Can this court, on the record of this case,

properly consider and determine the contention of plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?

In compliance with the direction of the court this additional brief has been prepared on behalf of the plaintiff in error. For greater convenience and in order that the whole matter may be presented under one cover, the facts in the case are here re-stated and the particular points upon which the court now desires further information are discussed in the sequence directed by the court. Such parts of the original brief for the plaintiff in error as relate to the special questions propounded by the court are incorporated herein.

STATEMENT OF FACTS.

The result of the trial in the lower court was a judgment for $7,000 against the plaintiff in error, entered in that court on December 12, 1901.

On the pleading and service papers the action is styled "trespass on the case for wrongful attachment." It was brought by the defendant in error to recover the damages which he claimed to have suffered as a result of an attachment levied nearly two years previously upon property belonging to the defendant in error at the instance, as alleged, of the plaintiff in error and his co-defendant in the lower court, Raphael Diaz Agueria.

Besides some traveling and other expenses claimed by the defendant in error to have been incurred in preparing his defense to the attachment proceeding, the damage especially complained of by him, as a result of the attachment of his property, is the alleged impairment of his reputation and credit as a merchant. A notice of the attachment was posted on his property by the court officials, and this, he alleges, injured his standing and credit in his community.

In the attachment suit Agueria sued as the executor of the will of one Claudio Barros. (Rec., 30.) But the affidavit attached to the declaration was sworn to by Fernandez,* the defendant in error (Rec., 31), as the

*The plaintiff in error is Fernandez y Perez, the defendant in error, Perez y Fernandez. To avoid confusion in names so much alike and in conformity with the Spanish custom of using the first patronymic in informal discourse, the plaintiff in error is referred to in the pages as Fernandez and the defendant in error as Perez.

agent of Agueria. He had been employed by Agueria in connection with the property of the estate of the decedent. On the face of the affidavit for attachment it appears that Fernandez was acting only in that capacity. But in bringing his subsequent action to recover damages for the alleged wrongful attachment, the defendant in error joined Fernandez as a defendant with Agueria. (Rec., 2.) The wrongful attachment of his property was set up in the declaration as a joint tort by the two defendants. Summons was served on Fernandez, but although Agueria, as stated in the declaration (Rec., 1), was a resident of Porto Rico, the marshal's return on the summons was that he was "unable to find the within named defendant, Raphael Diaz Agueria, within my district." It does not appear that any further effort was made to obtain service upon him.

The agent, Fernandez, appeared in the action by his attorneys and demurred to the declaration, which demurrer was overruled by the court. He then pleaded and the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's testimony the defendant requested what was doubtless intended as a peremptory instruction to the jury to find for the defendant. His motion was overruled. At the conclusion of all the testimony the court instructed the jury. And although Agueria had not been served *and the cause had not been dismissed as to him*, the case was allowed to go to the jury against the agent only. A verdict in general terms—"We, the jury, find for the plaintiff $7,000 in damages" (Rec., 76)—was brought in, and judgment was subsequently entered upon it against Fernandez only.

The further facts in relation to the attachment, on account of which the judgment for $7,000 was rendered against Fernandez in the subsequent action in trespass, were as follows: Perez, the defendant in error, prior to the action in attachment instituted against him, as he admits upon this record, was owing about 6,000 *pesos* to Barros. (Rec., 38.) The latter had died in Spain, leaving a will in which Raphael Diaz Agueria, one of the defendants in the court below, was named as executor. The will was probated in Spain and Agueria was there duly appointed executor of the estate of the decedent. The larger part of the estate seems to have been located in Porto Rico, and Agueria, although a Spaniard, seems to have been a resident of that island. (Rec., 1.)

The defendant in error, Perez, without making any arrangement for paying the indebtedness due from him to the estate of Barros, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 *pesos*. (Rec., 18.) The instrument seems to have embraced all the real estate that Perez owned in the island. (Rec., 51.)

A few weeks after its date this transaction came to the knowledge of the executor, Agueria. As the mortgage did not contain any provision for the payment of the debt due to the estate that he represented, Agueria took alarm and, acting under the advice of counsel, caused the attachment proceeding to be commenced against Perez, the defendant in error. The writ of attachment was issued and levied upon the house at No. 10 Peral street, Mayaguez, belonging to the defendant in error. (Rec., 13.) This property

was included in the mortgage and the writ therefore only reached the equity in it. (Rec., 21.)

The attachment proceeding was commenced on January 2, 1900, in a military court established by the United States military authorities. It was called "The United States Provisional Court for the Department of Porto Rico." But beyond the serving of the usual summons upon the defendant and the levying of the writ by posting on the premises a notice of the attachment, the proceeding seems to have gone no further. It was in fact subsequently stayed by injunction proceedings in the United States District Court at the suit of an heir of the deceased Barros. He raised the point that Agueria, who sued as executor, had qualified as such in Spain, where the will was probated, and had not taken out ancillary letters of administration in Porto Rico. He contended therefore that as such executor Agueria was not authorized in the latter jurisdiction to collect by judicial process the 6,000 *pesos* due to the estate of the decedent. The court so held and enjoined any further steps in the attachment proceeding.

After the attachment had been made, no other step seems to have been taken by either party to the action. The business of defendant in error was not taken charge of and he was not dispossessed. Only a notice of the attachment was posted in English on the premises, which was situated in the midst of a Spanish speaking people. "It was in English," says Gonzalez (Rec., 67), "but I found out *after inquiry* that it referred to an attachment."

A simple motion to vacate the attachment on the

technical ground that was afterwards raised in a suit in equity by a stranger to the attachment record, would promptly have terminated the proceeding and have resulted in the removal of the notice. And the defendant in error would have been able to have recovered his losses and damages at once in that proceeding as is more fully pointed out later in these pages. But he made no such motion, leaving it to a third person to take the steps necessary to dispose of the case.

As to the damages claimed to have been suffered by the defendant in error, there is some testimony—not explained in detail or with exactness—as to extraordinary fees paid to lawyers "*and for a great many other things*" (Rec., 46)—not explained—in connection with his defense. He also testified to traveling expenses back and forth through the island while preparing his defense, amounting in all to the sum of 1200 *pesos*. It is apparent, however, that the case proceeded in the court below on the theory that the gravamen of the action, in the mind of the defendant in error, was the alleged damage to his reputation and credit resulting from the attachment against him. And as to this issue there was practically no evidence to sustain the verdict; or as said on the motion for a new trial (Rec., 24), "the verdict of the jury has no evidence to support it and is so far contrary to the evidence as to shock the moral sense."

It is not to be expected that this court will examine this record with a view to the reversal of the judgment on the ground that the verdict is not supported by the evidence. But as indicating the general char-

acter of the result attained by the operation of a court of justice in this case, the writer ventures to summarize briefly the evidence offered by the defendant in error.

Mr. Bravo (Rec., 59) simply expressed the opinion that "a case like that" always affects a merchant "in some way or other." Mr. Koberg, when asked whether the credit of the defendant in error had been hurt seriously or slightly, replied, "I cannot say that. I do not know that." (Rec., 62.) Mr. Phillipi several times stated that the credit of the defendant in error was *not* hurt by the attachment suit (Rec., 63), and even when pressed by counsel he stated that he did not know whether it was affected or not and that he had no opinion on the question. (Rec., 64.) The witness Koester said that his credit was hurt "just to a certain extent," but he was not able to state how much. (Rec., 65.) Mr. Font said that he was a doctor and not a merchant and did not know about such matters; but his "understanding" was that an attachment against a merchant must injure his credit. Our friend Gonzalez saw the notice on the house. (Rec., 67.) It was in English, and as he was of an inquisitive turn of mind, he took steps to ascertain its meaning and learned that it referred to an attachment. But he did not venture any opinion as to its effect upon the credit and standing of the defendant in error. Mr. Ramos, when asked whether the attachment affected the credit and standing of the defendant in error, said, "I do not know, I cannot say." (Rec., 68.) When recalled in order again to testify on the same point, he said (Rec., 71): "I consider that

he *must* have suffered, because when a man has his property attached necessarily he suffers in his credit. I cannot state the amount of the harm done." And Mr. Ramos was a close business associate of Perez and a member of the firm to which Perez belonged. It was upon the house where this firm was doing business that the attachment notice was posted.

These witnesses were all called by the defendant in error and no other witness testified for him on this point or on any other point. The defendant in error himself said, in relation to the alleged injury to his credit, that his partnership was not injured because it never asked for credit. As to himself (Rec., 43) he said: "It is positive that my credit suffered greatly." But the only instance that he is able to give as a proof of the assertion is, that he wrote one Villamil & Co. for a loan of $2,000 and never got an answer. (*id.*) But he admits that he never was personally refused credit by anyone. After the Spanish speaking neighbors saw the English notice on the house, he says, "*I did not dare ask anybody*" for credit. (Rec., 43.) The attachment did not result in the presentation of bills and claims against him by his creditors. He says: "They did nothing, *but they were doubtful.*" (Rec., 50.) But the firm of Fritze, Lundt & Co. did collect a note *from his partner* that had long been overdue and unpaid. (Rec., 50.)

The record is bare of any other proof tending to show that the attachment did any harm to the good name or to the credit and standing of the defendant in error. And this court will not overlook the fact that the attachment was dissolved and the case dis-

missed not because it had been wrongfully issued—the debt was due from the defendant in error and he had by mortgage on all his real estate secured another large creditor to the exclusion of the estate of Barros—but only because of a technical incompetency on the part of the plaintiff to bring suit in Porto Rico.

I.

THE LOCAL JURISPRUDENCE WAS DISREGARDED BY THE COURT BELOW.

The original action in attachment was instituted, as heretofore stated, before a military court established by the military authorities then in possession of the island.

While the pleadings and orders in that court in that proceeding bear some resemblance in form to common law pleadings and orders, nevertheless that court proceeded in general conformity with the Spanish law relating to attachments. And it was exercising a jurisdiction that did exist under the Spanish codes.

But later the government of the island and its people was withdrawn from the military authorities and entrusted to civil authorities. A civil government was created for Porto Rico by the congress, and a civil court—the United States District Court for the District of Porto Rico—was established. Under the laws upon which the federal judicial system is established as well as under the statute creating that particular federal court, the local laws, pleading and practice were entitled to full recognition in the new court. The spirit,

as well as the express language of the statutes, required this. And in view of the fact that this government and that court were dealing with a people speaking a foreign language, it was especially the right of that people to have their affairs administered and justice done between them according to their own laws, which were accessible to them in law books in their own language, and made accessible to the federal court by official translations promptly published by the federal government.

The new civil government was established by the act of April 12, 1900. Section 8 provides in substance that the laws and ordinances of Porto Rico then in force should continue in force so far as they were not inconsistent or in conflict with the laws of the United States not locally inapplicable.

Section 34 created the United States District Court for the District of Porto Rico, and in addition to the ordinary jurisdiction of district courts gave it the jurisdiction of circuit courts, and provided that it "shall proceed therein in the same manner as a circuit court."

Section 914 of the Revised Statutes of the United States provides that:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The language of the Act of August 13, 1888, is:

> "That the Circuit Courts of the United States shall have original cognizance *concurrent* with the courts of the several states, of all suits of a civil nature, at common law or in equity."

The result of these provisions of law seems to leave the federal court in Porto Rico, so far as the local laws are concerned, exactly in the position of a circuit court of the United States sitting in a state. In other words, the local laws are the general basis of its jurisdiction, except in matters of an equitable nature. And the local practice and pleading ought to control in its administration of justice so far as that may be possible. In other words, while the Foraker Act did create a new court for Porto Rico, it did not enact for it a new code of laws. The new court, even though a federal court, could no more get along outside the local system of laws than could the local courts. It could administer justice, except in matters of an equitable nature, only according to the modes and actions provided in the local law.

In *Baltimore & Ohio Ry. Co.* v. *Hamilton*, 16 Fed., 181, the railroad company brought an action in replevin to recover the possession of certain rolling stock. It filed with the clerk of the United States Court for the Western District of Virginia such a bond as would be required in states in which the action in replevin is recognized by the laws. The clerk thereupon issued a writ of replevin. The defendant then moved to quash the writ on the ground that under the laws of Virginia there was no such form of action. The court says (p. 182):

> "In looking at this fact it appears that as early

as 1823 Virginia abolished this old common-law form of action for all purposes except cases of distress for rent, and in 1849 abolished it altogether, and for all purposes. There is no vestige of a case in replevin on the docket of this court, nor is there at Richmond, so far as inquiry can determine. The law of the United States requires (Section 914, Rev. St.) that the courts of the United States shall conform their forms and modes of proceeding to such as in like cases are the forms and modes of proceeding in the courts of record in the state where the United States court is sitting.

Now, in a like case, that is, in a case where a person is complained of for taking possession of and holding the chattels of another wrongfully, the courts of Virginia are not permitted to give the writ of replevin to a plaintiff to remedy his wrong; and as we must follow their form and mode of proceeding in such a case, we are not at liberty to issue that writ, but must follow the state's form and mode, whatever they may be."

In the action of trespass on the case subsequently brought in the new civil court by Perez against Fernandez to recover the damages claimed by Perez by reason of the alleged wrongful attachment by Fernandez against him, that court proceeded to a judgment against the plaintiff in error in disregard not only of the local laws in force governing the pleading and practice in courts, but in disregard of the substantive law of the island. There was not only no such conformity to the local pleading and practice as the law required, but there was no effort at conformity. The pleadings, service papers, orders and judgment conform to the forms in use in common law states. The action was designated on the pleadings as "trespass on the case," a form of action unknown to the Spanish laws. The declaration involves the principles of the

common law. The trial proceeded in the endeavor to conform to the rules of evidence at common law. And the court, in his instructions to the jury, all of whom (Rec., 9), with two exceptions, were Porto Ricans, discussed the case and the questions of law arising out of it, upon theories and principles that are to be found, not in the Spanish jurisprudence, but in text books and decisions relating to the common law of England.

The local system of laws, practice and pleading was absolutely ignored. Other records in this court doubtless show, as is the fact, that the lower court pays little heed to the local jurisprudence and that the relations and respective rights of litigants that come before it in civil actions are adjusted in accordance with the theories of a system of law that is not known to the people of that island. This record shows (p. 16) that the court below has entertained actions in replevin. Other official publications of Porto Rico show that it issues writs of garnishment. (1 Op. Atty.-Genl. of P. R., 159.) Neither writ is authorized by the local law, although it provides ample means for accomplishing the same results. Discussions of questions of Spanish jurisprudence, if they take place at all, are of infrequent occurrence in that court. In this particular case, in which two Spaniards had their rights adjusted upon the principles of the common law with which they were not familiar, the local law is not referred to in any form from cover to cover of the record.

As pointed out on the original brief for the defendant in error, one result of this attitude of the federal court in Porto Rico towards the local jurisprudence is that the native lawyers are debarred from practice

in that court. This is an intolerable hardship, and it is a condition from which they should be relieved by some timely announcement from this court. One result to this plaintiff in error was that the statute of limitations, which had run almost a year before this action was commenced, (Civil Code, Art. 1968), was not pleaded in his behalf, a result undoubtedly due to the fact that the American lawyers accustomed to the enforcement of the common law in that court have not deemed it necessary to familiarize themselves with the local law. And the Porto Rican lawyers who do know the local law but do not know the common law cannot practice in that court at all. Between them the plain rights of the plaintiff in error were sacrificed, if, as the plaintiff in error denies, the action below was well brought at all.

There is a growing feeling in the island that the local institutions and laws are not respected as they should be. This discontent is finding expression in public protests, and it seems essential that there should be a more careful scrutiny of the management of insular affairs in the judicial as well as in the other departments of the local government. The federal judicial system with its large and unusual powers is not readily understood by people trained under other forms of government. And the difficulty of understanding it is obviously largely increased when its adjudications proceed along the lines of an unwritten law among a people who are accustomed to the written codes of the civil law.

Not only is the action of trespass on the case a form of action unknown to the Spanish codes, but the sub-

ject matter of the action brought against the plaintiff in error in that court involved a claim that could not have been enforced against him under the local law. The lower court not only assumed jurisdiction in an action that was not authorized by law but it gave the defendant in error a remedy that did not exist under the law. In other words, it exercised a jurisdiction that did not belong to it.

No objection was made in the court below either to the form of the action or to the jurisdiction of the court to act upon the subject matter of it. No exceptions in that behalf were preserved on the record nor was error assigned in that connection. The question, therefore, arises whether the lack of jurisdiction in the court below to entertain such an action, suggested in this court for the first time, may now be considered. And this brings us to the first question propounded by the court in its order of December 5, 1904.

II.

CAN THIS COURT ON THE RECORD OF THIS CASE PROPERLY CONSIDER AND DETERMINE THE CONTENTION OF PLAINTIFF IN ERROR THAT A CIVIL ACTION LIKE THE PRESENT ONE WAS AT THE DATE OF THE ATTACHMENT AND THE COMMENCEMENT OF THIS ACTION UNKNOWN TO AND UNAUTHORIZED BY THE LAW AND JURISPRUDENCE OF PORTO RICO?

In the preceding pages and those that follow it has been shown that the lower court in the consideration of the case presented by this record assumed jurisdiction on the theory that the pleadings presented a right at

common law which it could properly proceed to try according to the common law. It has also been shown that no such right existed under the local law apart from and independently of the original attachment proceeding, and that the right to enforce such a demand as the plaintiff below endeavored to enforce existed only as an incident to and as a part of the original action in attachment, that remedy being exclusive of all other remedies.

If these points have been demonstrated, as is believed to be the case, then it follows that the lower court assumed jurisdiction in this case of a cause of action that was not authorized by the local system of laws and that could not have been enforced in the local courts. It therefore had no legal existence, and could not be enforced in the United States District Court for the District of Porto Rico, for the jurisdiction of that court is concurrent with that of the local courts. Aside from its special jurisdiction in equity and admiralty, and in controversies involving federal questions, it could not take cognizance of any right or claim that was not cognizable under the local law in the local courts or enforce any remedy not enforceable by the local courts.

If, therefore, the lack of jurisdiction was complete, as is contended in these pages, it seems to be clear that this court may now consider the question of jurisdiction and should reverse the judgment of the court below upon the ground that that court assumed jurisdiction where none existed and granted a remedy without legal warrant.

In *Campbell* v. *Porter*, 162 U. S., 478, the question was of the sufficiency of a codicil to devise or dispose

of real estate. Whether the orphans' court had jurisdiction to try any such question had not been raised either on the briefs of counsel or in the opinion of the lower court. It was raised for the first time on the briefs of counsel in the Supreme Court of the United States. The court, speaking by Mr. Justice Gray, said (p. 482):

> "A more serious question of jurisdiction, presented by this record, is whether the Supreme Court of the District of Columbia had power to admit a will or codicil to probate as a devise of real estate. Curiously enough, it is the plaintiff in error who contends that it had, and the defendants in error who insists that it had not. But it is immaterial by which party the question is made, for being a question of jurisdiction, it would be the duty of this court of its own motion to take notice of it."

It was held that the Supreme Court of the District of Columbia, upon the application for probate of the codicil in question, had no authority to determine upon its sufficiency to pass real estate, and its order was accordingly reversed.

Although not a court of last resort, a clear and terse expression of the rule which seems to control in such cases, will be found in *Nigh* v. *Dovel*, 84 Ill. App., 228. Here the question, not preserved on the bill of exceptions or presented in the lower court, was as to the jurisdiction of a justice of the peace of a claim exceeding $200. The court, although it found that the claim did not exceed $200 as contended, on the general question said:

> "The want of jurisdiction urged in this case was not jurisdiction of the parties, but jurisdiction of the subject matter. Want of jurisdiction of a sub-

> ject matter over which, under the law, a court has no jurisdiction, may be suggested to the court at any time and in any manner that will call the attention of the court to such fact; or if it occurs to the mind of the court at any stage of the proceedings even without suggestion, then it is the duty of the court, whether moved to do so or not, to at once dismiss the case."

In the case now before this court the damages for a wrongful attachment could only be awarded in the attachment proceeding itself. The lack of jurisdiction in the lower court to entertain such a claim for damages was quite as fundamental as would have been the lack of jurisdiction of the justice court over a claim exceeding $200, or as was that of the orphans' court to pass upon the sufficiency of a codicil to pass real estate. In each case the lower court dealt judicially with a subject matter over which jurisdiction vested by law in another court.

In *Thompson* v. *Railroad Companies*, 6 Wall., 134, the point was that the complainant had a plain and adequate remedy at law and therefore the court of equity had no jurisdiction. The appellees urged that "where a case is supposed to be not cognizable in a court of equity, the objection should be interposed in the first instance. After suit has been regularly heard below upon its merits, the objection comes too late."

Mr. Justice Davis, in an opinion reversing the decree of the lower court, said:

> "Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, *but if a plain defect of jurisdiction* appears at the hearing, *or on appeal*, a court of equity will not make a decree."

In *Allen* v. *Pullman Palace Car Co.*, 139 U. S., 658, it was held that a decree granting an injunction will be reversed where a court of equity had no jurisdiction in the premises, though the question was raised for the first time on appeal.

In *Parker* v. *Ormsby*, 141 U. S., 81, in which the question of jurisdiction because of the lack of requisite citizenship, had not been suggested in the lower court, but was first raised in this court on appeal, Mr. Justice Harlan said, page 86:

> "The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts, *or by failing to act*, to waive the question of jurisdiction of the Circuit Court. This is an error. We said in *Metcalf* v. *Watertown*, 128 U. S., 586, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this court must examine and determine even if the parties forbear to make it, or consent that the case be considered upon its merits."

In *Mansfield, &c., Ry. Co.* v. *Swan*, 111 U. S., 379, the question arose as to the jurisdiction of the lower court, when the necessary citizenship of the parties did not appear in the record. In deciding that such citizenship must appear affirmatively from the record this court speaking by Mr. Justice Matthews said (page 382):

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is in-

flexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Manifestly this must be the law, else disastrous judicial confusion would ensue. The law only, and not either the consent or the inadvertence of the parties, ought to mark the limits of the jurisdiction of the court and determine what rights may be adjudicated and what remedies enforced in it. Neither the failure of the parties to raise the question of jurisdiction in the lower court, nor the failure of the lower court to pass upon it, should be permitted to tie the hands of an appellate court and thus compel it in the face of the law to affirm a judgment entered in a case of which by law the lower court had no jurisdiction.

In *United States* v. *Ruckabee*, 16 Wall., 414, there is nothing in the opinion or in the briefs of counsel to show that the question of the jurisdiction of the lower court was ever raised before the case was taken to the Supreme Court of the United States. But the decree was there reversed for lack of jurisdiction in the court below; and this was done at the suggestion of the plaintiffs and to their advantage, although they had set the lower court in motion. And the reasoning of

the court shows that it is not essential that the lower court shall have considered the question.

In *Fiester* v. *Shepard*, 92 N. Y., 251, where, upon issue joined upon a petition to require an executor to render account of his official acts and an answer denying the allegations of the petition, an order had been entered by the lower court requiring the executor to show cause why he should not pay the residue of the estate to the petitioner, the Court of Appeals of New York, speaking by Ruger, Ch. J., said:

> "The point is now made by the executor that the surrogate had no power to entertain this proceeding and adjudicate upon the question presented by the petition, that being the only question tried by him. We believe the point is well taken.
>
> Although so far as the record shows this objection was neither raised in the Surrogate's Court nor at the General Term, yet as it lies at the foundation of the proceeding and concerns the jurisdiction of the Surrogate over the subject-matter of the controversy, *it is effectual and may be taken at any stage of the proceeding and must be considered and disposed of when raised.*"

Fowler v. *Eddy*, 110 Pa. St., 117, was a case in which a recorder had adjudged that rent was due by Fowler to Eddy. Upon a writ of certiorari to the court of common pleas it was argued that under the statute then in force the recorder had no jurisdiction to enter a judgment. This objection was overruled and the judgment of the recorder was affirmed. The defendant took a writ of error and the Supreme Court in holding that the recorder had no jurisdiction, said:

> "This judgment being invalid by reason of no jurisdiction in the court which pronounced it, it

cannot support the execution issued thereon, and the court erred in not reversing the judgment. *It is never too late to attack a judgment for want of jurisdiction.*"

Fairfax Forest Min. & Mfg. Co. v. *Chambers*, 75 Md., 604, was a suit in assumpsit under a special contract. In the course of the opinion, Robinson, J., said:

> "And this brings us to the question of jurisdiction, a question *not made in the court below, but made for the first time on this appeal.* * * * *It can hardly be necessary to say that a judgment rendered without jurisdiction of the parties or subject-matter* is a void judgment, and that objection to the jurisdiction may be made in the court below, or *it may be made for the first time on appeal*, for the reason that such a judgment is a nullity."

Forsyth v. *Hammond*, 142 Ind., 505, was a suit growing out of a proceeding by the board of county commissioners to annex territory to the City of Hammond. On a petition for rehearing in the Supreme Court, Howard, Ch. J., said:

> "One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial function, and as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced *was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, it is one that will be entertained at any time.*"

To put it in a concrete form the point in all these

cases is that the lower courts, under the law, did not have the power to do what they did do. It is not a question of form, but of substance. They were not authorized by law to enter the decree that was entered or to render the judgment that was rendered, because they had no jurisdiction over the subject matter. Such jurisdiction rested either in other courts than the ones that acted or did not exist at all. They did what they could not do and the upper courts held that they could not do what they did do.

The rule announced in these citations seems to be entirely applicable to the case presented on this record. And if it be true, as here contended, that the right of the defendant Perez to recover damages against Fernandez for the wrongful attachment, could only be enforced under the local law in and as a part of the original attachment proceeding, it is difficult to see how the judgment for such damages by another court in a separate proceeding can stand. The jurisdiction of the court to render such a judgment or to entertain the subject matter of such an action is now suggested and denied. Under the authorities cited it is submitted that this court can and must now pass upon it.

If a record should come to this court from which it appeared that a circuit court of the United States had taken jurisdiction of a cause in admiralty or a matter of bankruptcy, or of any other case of which by law the district courts of the United States have exclusive jurisdiction, it is believed that this court would not hesitate on its own motion to deny the jurisdiction of the lower court even though the question had not been properly reserved on the record or suggested by counsel. It is

difficult to see how such a case can readily be distinguished from the case presented by this record. If, as here contended, the only remedy open to the defendant in error was the presentation of his claim for damages in the action in attachment, manifestly the court having jurisdiction of the action itself would also have exclusive jurisdiction of the claim for damages. But the record shows that notwithstanding the fact that the law vested exclusive jurisdiction in that court, another court has assumed jurisdiction and has acted. The fact being suggested to this court, it is difficult to see how it can avoid holding that the lower court was without authority to enter such a judgment. The same theory would seem to control the other phase of this case. The laws of the island, of which this court will take judicial notice, exclude the exercise of a common law jurisdiction. Notwithstanding this fact the record shows that the lower court in this case did exercise such a jurisdiction and did adjudicate the rights of the parties to the action in accordance with the common law and in utter and complete disregard of the local law. If therefore this court would not hesitate, as it has not in many previous cases, to hold that the wrong court had exercised jurisdiction in a given case, it ought not, as is submitted, to hesitate to hold that a court in this case has exercised a wrong jurisdiction, a jurisdiction foreign and unknown to the laws of Porto Rico.

III.

WAS A CIVIL ACTION LIKE THE PRESENT ONE KNOWN TO THE LAWS AND JURISPRUDENCE OF PORTO RICO AT THE TIME THE ATTACHMENT IN QUESTION WAS SUED OUT?

When one has not lived under a foreign system of laws and has not practiced under it as a lawyer and thus had an opportunity to absorb its traditions, it is not always a simple matter to grasp and understand its spirit and full scope. And therefore the writer, who has had some personal experience with the Spanish laws relating to public rights, but a very limited contact with the laws relating to private rights, finds himself unable to explain with any satisfaction to himself, and much less to the satisfaction of this court, the exact scope and limits of the remedies provided in the Spanish jurisprudence for the redress of wrongs that are independent of contract. He has observed, however, that the Spanish courts are appealed to in that class of cases with a notable infrequency. Decisions in action in tort, as we call them, occupy a small place in their reports. Rights and remedies of that kind occupy a still less important place in their text books. In his work in the civil law of Spain Sanchez Roman apparently says all that he has to say on wrongs independent of contract in less than one printed page (Vol. 4, p. 1017). He dismisses the question of malicious wrongs such as assaults, etc., and the civil liability arising out of them with the mere statement (*id.*) that they are fully explained in the *penal* code. Falcon in his annotations of the civil code gets through with the subject in three and a half pages (p. 429) without say-

ing anything that throws light on the matter to a student of law with common law antecedents. All this led the writer in his original brief to say, with a proper disclaimer of any special learning on the question (p. 26), that the law of torts as a branch of purely civil remedial justice had a limited application in the Spanish jurisprudence, although there was a modified recognition of the principle that a wrong done creates an obligation to recompense the person injured. This impression of this phase of the Spanish law had been strengthened when natives who had suffered personal injuries went into the United States District Court for the District of Porto Rico to recover damages instead of going into their own local courts. The general experience is that in cases of that class more liberal results are obtainable in the local courts than in the federal courts. And it is the general practice for plaintiffs in such cases to seek the jurisdiction of local courts. This very record cannot fail to evoke the inquiry why a Spanish speaking person should resort to the federal court rather than to the insular court in order to enforce rights against another Spanish speaking person. Every consideration would suggest an appeal in such a case to the insular courts where both the litigants and their witnesses could be understood without interpreters.

The explanation of these matters lies in the fact that the federal court of Porto Rico has not been administering the local laws as required by the fundamental principles upon which the federal system is based, and that results could be arrived at there that could not be arrived at in the insular courts.

It is true that decisions are to be found in the Spanish reports that on their face have the general appearance of actions in tort. But apparently they do not proceed on the lines of such actions in our courts, either with respect to the character of the evidence admitted, the elements that go to make up the claim of damages or in the amount of damages awarded. The writer is not prepared to enter upon any disquisition showing just how such actions differ from our actions of tort, but that the views here expressed are not his personal views only, will sufficiently appear by reference to an article in the Review of Reviews for September, 1905, by the Hon. Charles Sumner Lobingier, an American judge of the Court of First Instance in the Philippines. The article is entitled "Blending Legal Systems in the Philippines." Manifestly Judge Lobingier, sitting in a trial court of general jurisdiction, has ample opportunity for observing and knowing exactly what the state of the law is. After speaking of the conservatism of the American government there in modifying and changing the substantive law of the island, he says (p. 337):

> "Certain additions have been made in the form of acts of the Philippine Commission as by enacting new libel and trade-mark laws providing, *inter alia*, for *civil* actions based thereon. *The Spanish law, it may be remarked, has no department corresponding exactly to what in the English law is designated by the term 'torts'*—*i. e.*, wrongs independent of contract and redressed by a *civil action* as opposed to a *criminal prosecution*. Doubtless the deficiencies of the Spanish law in this regard will require considerable similar legislation in the future. But the existing codes of substantive law, so far as they go, remain, meanwhile, practically unimpaired."

This reference to the criminal prosecution as a means of recovering civil damages for wrongs that are independent of contract is illustrated by the fact that practically every conviction is accompanied by a judgment for civil damages. Article 16 of the *penal* code provides that "every person criminally liable for a crime or misdemeanor is also civilly liable." In Article 613 of the same penal code civil liability by criminal process is also attached to

> "Those who through mere *imprudence or negligence*, without committing a violation of the regulations, shall cause an injury, which, *if done with malice*, would constitute a crime or misdemeanor."

With respect to wrongs against property the criminal code provides in Article 627:

> "Those who intentionally *or through negligence or carelessness* shall cause any damage whatsoever, not punished in this or in the preceding books, shall be punished with a fine, etc."

But even if the writer were competent to undertake the task, it would not be necessary at this time to enter upon a close analysis of the Spanish law for the purpose of ascertaining just what civil damages are recoverable in criminal prosecutions and what in civil proceedings. It will suffice if it can be discovered under what provision of the civil law the action on this record could have been entertained.

As the cause of action below was pleaded and tried malice was the gist of it. The instructions to the jury were also based on the theory that proof of malice was essential to a recovery, and that, if not actually proved, it might be implied if there was no probable cause for

the attachment. In other words a common law *cause of action* was set up and a common law remedy invoked and adjudged.

Under the Spanish laws the only general remedy for recovering damages by civil action is mentioned in two, and only two, articles of the civil code so far as the writer has discovered. There are some special remedies in special cases, such as the special remedy hereafter referred to for recovering damages upon the vacation of an attachment. The general provision is found in Articles 1101 and 1902. The first article has no application because the defendant below was clearly not "fulfilling an obligation" to the plaintiff in levying an attachment against his property. Article 1902 is as follows:

> "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage done."

The plaintiff in error was neither at fault nor was he negligent in bringing the attachment suit against the defendant Perez, and there was no endeavor to prove that he was. The act complained of in the declaration is set up as a wanton, willful and "malicious" act, not as a negligent act. This was the cause of action claimed by the plaintiff below, and it was for such a cause of action, the motive of which was malice, that the court granted a civil remedy in damages.

Clearly the alleged *malicious* act of Fernandez in levying an attachment against Perez was not a *negligent* act. What is done wantonly and in malice cannot be said to have been done negligently. Negligence im-

plies mere inadvertence, while malice implies deliberate evil intention. "Fault" as used in Article 1902 is the English for the Spanish "culpa." It is clearly not malice, for which the Spanish have the word "malicia". "Culpa" may imply intent with respect to the act, but not an evil purpose with respect to the result of the act. Malice implies both.

Sr. Sanchez Roman in his Civil Law (4th Vol., p. 1017), in treating of Article 1902, refers for a definition of "culpa" as there used, to what he has said of the same word as used in the articles of the Civil Code that provide an action for damages for wrongs arising out of contract. In the latter connection (p. 278), he says that volition, in the act or omission that causes the loss or damage, is characteristic of "culpa" just as it is of fraud; but that with respect to the damage done, it lacks the element of intention that is present in fraud. That is to say, as he puts it, "culpa" is lacking in the deliberate purpose to cause damage or loss as is the case in fraud. He then proceeds to say that "culpa" signifies a voluntary act or omission, the result of which is the non-fulfillment of the obligation; but that this non-fulfillment *does not have for its motive the intent to cause damage.*" The loss and damage which necessarily results to another from "culpa" or fault, is not considered by the person when the act which constitutes the fault is done or left undone. The author concludes this definition of fault or "culpa" by saying that it is not the intent, in "culpa," to do damage, that gives rise to the liability, as in a case of fraud, but it is the *lack of diligence* which may occur

in the improper act or omission to act.[1] The same author (p. 281), considers that *intent* to cause the loss or damage would turn the act into a fraud or crime.[2]

Falcon in his fourth volume on the Civil Code (p. 431), in commenting on Article 1902 and as being embraced within it, refers to the "damages which are daily caused to persons and property by imprudence, stupidity, bad judgment and negligence, that is to say, by fault or omission,"[3] thus wholly excluding malicious acts from consideration as acts for which civil damages may be recovered under that provision of law.

It thus appears that the alleged malicious act of the plaintiff in error out of which the defendant in error claims the right to recover damages is not such an act as is contemplated under Article 1902, which seems to be the only general provision in the civil code under which a person may recover civil damages arising from wrongs not related to contract. Under that article an act *not malicious* may give rise to an action for damages

[1] Es caracter de su naturaleza, como en el dolo, la nota de *voluntaria*, en la accion u omision causantes del dano o del perjuicio, pero le falta el elemento *intencional* del dolo, en relacion directa con el perjuicio mismo, o sea el deliberado proposito de perjudicar o danar, que en el dolo es indespensable. La culpa representa una accion u omision plenamente voluntarias, por las cuales resulta incumplida una obligacion, pero este incumplimiento no tuvo por movil el proposito de perjudicar ni se tuvieron en cuenta, al realizarse la accion u omision constitutivas de la culpa, las consecuencias danosas o perjudiciales para el derecho de otro, que la misma habia de producir.

En suma, no es la voluntad de perjudicar lo que origina la responsabilidad, como en el dolo; es la falta de diligencia que puede consistir en accion u omision indebidas—culpa *in faciendo*, culpa *in non faciendo*.

[2] Que este incumplimiento sea involuntario, con un fondo de negligencia en la accion o en la omision origen del incumplimiento, pero sin que tenga la nota de intencional, deliberado o fraudulento, para causar el dano o el perjucio que de el resulte; en cuyo caso ya hemos dicho constituiria la nocion del dolo o de un delito.

[3] Los danos y perjucios que a las personas y a las propiedades se causan diariamente por imprudencia, torpeza, mala direccion y negligencia, es decir, por culpa u omision.

of the limited and concrete character required in the Spanish law. But if, as is denied, a wrongful attachment can ever sustain a civil action for damages, it is insisted that it could not be so sustained as a malicious act. The plaintiff below has claimed rights arising out of a malicious act and as such apparently the jurisdiction was in the criminal court and not in the civil court.

Now a word with reference to the proof offered by the plaintiff below in support of his contention. Attention has already been called to its character, extraordinary in that to a singular extent it fails to show that the plaintiff suffered any damage at all (*vide*, pp. 8 and 9).

In this connection it was said on the original brief for plaintiff in error (p. 26):

> "It is believed, however, that it will be found to be a well settled doctrine in the Spanish jurisprudence, that damages may be recovered in an exclusively *civil* action only when the injury done is of a *material* character capable of being *definitely valued*, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case the damage must be '*repaired*.' In plain English it must be 'made good.'"

Interesting examples of this rule may be found. In the *Decision of December 6, 1882*, the Supreme Court of Spain held, in an action to enforce civil responsibility for criminal attack upon the honor of the plaintiff, that a man's honor could not be valued and that it was impossible to fix the amount of the damages.

The essential principle in all the Spanish cases is that damages must be definitely proved in all cases.

In the *Decision of June 25, 1880*, 43 Jurisp. Civil,[4] p. 772, the court, referring to its previous decisions, says that "the legal doctrine sanctioned by this court relating to what is essential to the recovery of damages is that they be *fixed* and *proved* in a *positive* and *concrete* manner."[5]

In the *Decision of September 30, 1898*, 84 Jurisp. Civil, 795, it is said that (p. 806):

> "It is a doctrine constantly recognized and announced by this court that every condemnation for losses and damages must be preceded by ample proof of the *reality* and *existence* of the losses and damages demanded."[6]

As to the character of the evidence, it may be said that it was the duty of the plaintiff in error to reserve proper exceptions on the trial. That is true. But this reference to the Spanish law relating to the character and extent of proof necessary to establish the right to recover damages has a more fundamental purpose. The point that the writer seeks to emphasize is that the record shows a wide departure by the lower court, in the matter of evidence as well as in all other phases of this litigation, from the local law. He was enforcing, in other words, the common law of England, and not the laws of the island.

[4] The decisions of the Supreme Court of Spain are identified not by the names of the parties litigant but by the date on which the decision was rendered. The references are to a series of volumes called "Jurisprudencia Civil," now aggregating about 95 in number, which contain the decisions of that court.

[5] "la doctrina legal sancionada por el Tribunal Supremo relativa a que es condicion esencial para la reclamacion de perjuicios el fijarlos y perbarlos de un modo positivo y concreto."

[6] "siendo doctrina constantemente reconocida y declarada por este Tribunal Supremo que a toda condena de danos y perjuicios * * * ha de preceder justificacion bastante de la realidad y existencia de los danos y perjuicios que se demanden."

In responding then to this third proposition propounded by the court it is insisted:

1. That the right of action claimed by Perez against Fernandez was a right of action recognized in the common law but not in the law then in force in Porto Rico.

2. That such a claim for damages, based on malice on the part of Fernandez, could not have been enforced in a civil action under the local law.

3. That the only remedy open to the defendant in error was the remedy provided by law in the attachment proceeding which, as shown in the subsequent pages, was exclusive of every other remedy.

IV.

THE DAMAGES AWARDED IN THIS ACTION OF TRESPASS ON THE CASE COULD HAVE BEEN ASSESSED IN THE ORIGINAL ATTACHMENT PROCEEDING.

In the Spanish law an attachment is called an "embargo preventivo" which may be translated as a "provisional seizure" or as an attachment. In substance, the Spanish action in attachment and the form and manner in which it must proceed are very similar to the action in attachment with which American lawyers are familiar.

The Spanish law in relation to provisional seizures or attachments is found in Title XIV of the Code of Civil Procedure.[7] Its general provisions are as follows:

[7]This code, as well as the other Spanish codes in force in Cuba and Porto Rico, have been translated into English by the War Department, and have been published at the government printing office. And the citations in these pages are to these official translations.

When the claim exceeds 1,000 *pesetas* the district judge has jurisdiction to order an attachment; when it does not exceed that amount the jurisdiction rests with the municipal judge. (Art. 1395.) An attachment may be ordered (Art. 1398) when the debt is evidenced in writing and any one of the following conditions exist: If the debtor be a foreigner; or if, being a citizen, he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded. It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors.

As in the case of our own attachment acts, a provisional seizure may be ordered (Art. 1410) at the same time the action to recover the debt is instituted, or afterward in aid of an action already instituted, if the proper showing be made. After the seizure has been made the plaintiff must within twenty days file his declaration or statement of his demand (Art. 1409). Should he fail to do so the attachment will be annulled. If the debtor whose property has been seized requests it, the plaintiff must file his declaration or statement of claim within ten days (Art. 1413), and upon his failure to do so the attachment must be vacated.

But unlike attachment proceedings as commonly established by legislation in the United States, the Spanish law of provisional seizure or attachment, in

force in Porto Rico at the time involved on this record, provides, in case the attachment is vacated for any cause, for an adjudication, *in the action itself*, of the claim of the defendant for damages arising out of the wrongful attachment. Title XIV of the Code of Civil Procedure contains elaborate and complete provisions for such an adjudication. (Arts. 1409, 1410, 1411, 1412, 1413, 1414 and 1415.)[8]

In Article 1410 it is provided that when an attachment is vacated by final ruling the plaintiff in attachment "shall be taxed all the costs and be adjudged to indemnify the defendant for any losses and damages he may have suffered." In Article 1413 the provision is that upon the vacation of an attachment by reason of the failure of the plaintiff when requested to file his declaration within ten days "the attachment shall be vacated and the costs, losses and damages shall be taxed against him." In Article 1411, which relates to the vacation of an attachment for certain specified causes, the provision is that "all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendant for any losses and damages he may have incurred." The same article contains another clause providing that when the attachment is vacated for any reason other than those specifically named, "the ruling thereupon shall also determine what may be proper according to the cases with re-

[8]These articles of the Code of Civil Procedure then in force in Porto Rico correspond with Articles 1411, 1412, 1413, 1414, 1415, 1416, 1417 of the Code of Civil Procedure then and now in force in Spain. Apparently some slight change in the law of Civil Procedure as authorized for the Spanish colonies, produced this variation in the numbers of the respective articles in the two codes. This difference in numbers must be borne in mind when examining the decisions of the Supreme Court at Madrid to which reference is made later in these pages.

gard to costs and the indemnification of losses and damages which may have been suffered."

In Article 1415 it is provided that when there has been an adjudication by final order against the plaintiff for the losses and damages suffered by the defendant they shall be recovered according to the procedure established in Articles 927 *et seq.* of the same code (p. 182).

The articles last referred to are embraced in Title VIII of the Code of Civil Procedure relating to the "Execution of Judgments." They provide a process by which, as an incident to the principal action, but with all due formality, the amount involved in a judgment may be ascertained. It seems that in many forms of action under the Spanish practice the first issue before the court involves questions of law and the right, upon the evidence, of one party or the other to recover. It being decided that one party is entitled to recover from the other, an issue is framed for determining the amount to be recovered. And this issue is settled by the same judge in the same action, the judgment in the principal proceeding not being final until the amount of the claim is thus liquidated. In an action in attachment, for example, the order vacating the attachment would also impose costs upon the plaintiff and condemn him to pay the defendant's losses and damages. Before this judgment could be executed it would be necessary to resort to the procedure established in Articles 927 *et seq.*, under which by proper statements or pleadings and counter pleadings an issue is arrived at and set for hearing, witnesses are called, evidence introduced, and the court after due consideration of the

record finds whether any damage has been suffered and, if so, to what amount. This finding becomes a part of the final judgment in the attachment suit.

The procedure bears a strong analogy to a suit in equity where the questions of law and of fact having been first determined and the right of the complainant to recover against the defendant having been established, the court, before entering a final decree, refers the cause to a master or hears the testimony himself, to determine and liquidate the amount to be paid. This having been determined, a final decree is then entered embracing the amount so arrived at.

Such a preliminary finding for the complainant on the law and the facts by a court in chancery is not, generally speaking, a final order and cannot be appealed from; it only becomes final when the master or the court has taken the necessary testimony to ascertain the amount due from the defendant to the complainant and has embodied it in the final decree. So there are repeated decisions by the Supreme Court at Madrid in which it is held that the preliminary order vacating the attachment and ordering the plaintiff to pay the costs and to indemnify the defendant for his losses and damages, is not final, and cannot be appealed from until the amount of the losses and damages so to be paid has been ascertained in accordance with the procedure established in Articles 927 *et seq.* of the Code of Civil Procedure.

Decision of December 4, 1901, 92 Jurisp. Civil, 550-3.

Decision of October 20, 1899, 88 *id.*, 130.

The right thus established of the defendant in an

attachment proceeding to recover from the plaintiff not only the costs but the losses and damages occasioned to him by an attachment which, for any cause has been vacated, is unquestioned in the Spanish courts. The right has been upheld in numerous decisions by the Supreme Court of Spain and apparently has never given occasion for any question of doubt.

In a controversy between Don José Gamero y Porras, a professor in the naval academy at Manila, and Dionisio de las Cajigas y Hernandez, a citizen of the same place, a promissory note was involved which purported to be signed by the defendant. But Cajigas denied his signature on the document under conditions that led the plaintiff to assert with some vehemence that he was lacking in good faith and was simply endeavoring to elude his just obligations. Whatever may have been the real facts in the case, the plaintiff was unable to prove the signature to be the genuine signature of the defendant, and the attachment that he had caused to be levied on the latter's property was therefore vacated. The result was that besides losing his claim against the defendant he was adjudged, in the attachment action itself, to pay not only the costs of the proceeding but the losses and damages which the defendant succeeded in proving that he had suffered. The plaintiff took an appeal to the Supreme Court of Spain where his main effort apparently was to get rid of the judgment that had been rendered against him for losses and damages. Although that court seems to have entertained some suspicions of the good faith of the defendant in the matter, it found itself unable to extend any aid to the plaintiff. It says:

"When a provisional seizure has been annulled be-

cause it is not embraced within the terms of Article 1382 of the law of Civil Procedure in the Philippines, the court can do no less than condemn the plaintiff in costs and to the payment of losses and damages in compliance with what is expressly ordained in Article 1394."

Decision of December 3, 1892, 72 Jurisp. Civil, 494.[*]

In a controversy between Piza Bros. and Iglesias & Co. that arose in Porto Rico concerning a small indebtedness, the plaintiffs had the misfortune of not being able to prove their claim, and so the attachment that had been levied upon the property of the defendants was vacated. But the lower court saw something in the case that seemed to justify it in not awarding the costs against the plaintiffs and in not requiring them to pay the losses and damages occasioned to the defendants by the attachment. The defendants complained on the appeal papers that, although the court had declared the attachment improper and unlawful, it nevertheless had not condemned the plaintiffs to pay the costs or to indemnify the defendants for their losses and damages as expressly ordered in the law. They insisted that under Article 1414 the court could not dispense with the formality of taxing the costs and losses and damages against the plaintiffs when it va-

[*]The text in Spanish is: Que dejandose sin efecto un embargo preventivo, por no estar comprendido en ninguno de los casos del art. 1382 de la ley de Enjuiciamiento civil de Filipinas, no puede menos de condenarse a quien lo pidio en todas las costas y a la indemnizacion de danos y perjuicios, en cumplimiento de la que terminantemente ordena el art. 1394.

It is understood that the Code of Civil Procedure formerly in force in the Philippines is substantially identical with the codes in force in Cuba and Porto Rico, except as to the numbers of the articles. The articles mentioned in the above quotation are undoubtedly identical with articles 1408 and 1410 of the Porto Rican Code.

cated the attachment. The Supreme Court at Madrid concurred in this view and reversed the sentence.[10]

Decision of November 6, 1888, 64 Jurisp. Civil, 538.

An earlier case is the *Decision of April 24, 1861*, 8 Jurisp. Civil, 267. Here the amount involved was a matter of 12,000 *reales*, to secure the payment of which a provisional seizure was made at the instance of Don Fernando Jaquete against the house of the heirs of one Don Gregorio de la Morena. Subsequently for proper cause the attachment was vacated. The court before whom the cause first came entered judgment in the action against the plaintiff for costs and for the losses and damages of the defendants. The case seems then to have gone to an intermediate appellate court, where that part of the judgment vacating the attachment was affirmed and that part condemning the plaintiff to the payment of costs and losses and damages was revoked. The defendants then appealed to the Supreme Court, which held that upon the vacation of a provisional seizure a *necessary consequence* was the condemnation of the plaintiff in costs and to the payment of the losses and damages.[11] And it ordered a rectification of the judgments below in accordance with this principle.

---

[10] In Spanish the text is as follows: "Porque reconocidos en aquella que no se ha justificado la existencia de la deuda, requisito esencial para decretar el embargo preventivo, la condenacion en todas las costas y a la indemnizacion de daños y perjuicios es un precepto expreso é ineludible de los artículos citados."

[11] The Spanish text at p. 268 is: Considerando que reconocidos en los fundamentos de la ejecutoria que en el caso actual no concurre ninguna de las circunstancias legales que autorizan el embargo preventivo, dejandole por lo mismo sin efecto, era una consecuencia necesaria la condenacion en costas y el abono de daños y perjuicios.

At the foot of page 250 of the official translation by the War Department at Washington of the Spanish Code of Civil Procedure will be found a note as follows:

> "When a provisional seizure is vacated on account of the non-attendance of any circumstances which authorize the same, *a necessary consequence* is a judgment for costs and the payment of losses and damages—*Decisions of October* 15, 1859 *and April* 24, 1876."

It will not be necessary to cite further cases in this connection. The various provisions of Title XIV for ascertaining the damages to be awarded upon the vacation of an attachment are so clear and the cases already cited, in which they have been applied, so conclusive, that, it may be assumed, the existence of such a remedy in the attachment proceeding itself will not be seriously questioned by the defendant in error.

The question then remains whether the remedy thus established is exclusive or whether there exists a remedy by a separate and independent action such as the one on this record.

V.

THE MODE PROVIDED IN TITLE XIV FOR ASCERTAINING LOSSES AND DAMAGES IN THE ATTACHMENT PROCEEDING ITSELF WAS EXCLUSIVE UNDER THE LAW THEN IN FORCE OF EVERY OTHER MODE.

The proposition that there is a remedy independ-

ent of the attachment proceeding is an affirmative one, the demonstration of which, if it be considered simply as an abstract question without reference to the fact that the plaintiff in error faces a judgment of the lower court against him, seems to be a burden resting upon the defendant in error. And the best demonstration that it does exist will be the citation of a decision of the Supreme Court of Spain to that effect. The writer has been unable to find any such case in the books that were available for examination by him. Nor has any such case been found by the Spanish lawyers in Spain, Cuba and Porto Rico whose aid has been enlisted in the investigation of this case. If the researches of counsel for the defendant in error have been more fruitful and they have discovered such a decision by the Supreme Court of Spain it will doubtless appear on their brief and the question will be answered.

But after all these years of practice under that code of civil procedure it seems rather inconceivable, if such an independent remedy exists, that instances of its application should not be found among the reported cases. And if no such decision has been found the inference would seem justly and necessarily to follow that there is no such independent remedy. Certainly it would be an anomalous incident in jurisprudence if a decision that such an independent remedy does exist under the laws of Spain should be announced for the first time by the Supreme Court of the United States.

The decisions of the Supreme Court of Spain above

cited as examples of many adjudications in which losses and damages, as well as costs, have been awarded in the attachment proceeding itself, and as a part of the final judgment in the action, indicate that the constant practice is to invoke that remedy for recovering damages for a wrongful attachment. And the absence of any decision, if learned counsel also have been unable to find a decision sustaining the right to recover such damages in a separate and independent action, would seem to indicate that the universal understanding of Spanish lawyers and judges is that there is no such remedy under the law.

The only discussion of the question that the writer has been able to find anywhere is in the commentaries on the law of civil procedure[12] by Sr. José Maria Manresa y Navarro, a text writer of the highest standing in Spain. He is understood to have been one of the codification commission that amended and compiled the code of which he treats, and his commentaries are said to be the *vade mecum* of every practicing lawyer in Spain and its former colonies.

In the edition of 1891 of this treatise the author, in discussing certain phases of the mortgage law and the form of recovering damages against one who has wrongfully encumbered or clouded the title of another of record, refers to a decision of the Supreme Court of Spain which holds that in a certain suit relating to the title of real estate, such damages are recoverable in an independent action, there being no provision in the

[12] "Comentario a la Ley de Enjuiciamiento Civil" published at Madrid

mortgage law authorizing their recovery in the same action (p. 411). He then says (p. 412):[13]

> "We do not think that this rule is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in article 1417 (1415 in Porto Rico), that is, according to the procedure provided in Article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions *without the necessity of a new suit, which is precisely what the law has sought to avoid.*"

The very language of the Title XIV adds strength to this view, and seems to lead irresistibly to the conclusion that only in the attachment proceeding may the defendant recover damages for the wrongful act of plaintiff in causing his property to be seized.

In Article 1400 the plaintiff is required to give a bond to answer the damages and costs. In Article 1411 the provision is that when the attachment is vacated, the bond shall be canceled "and all the costs *shall* be taxed

[13] The Spanish text is: No creemos aplicable esta doctrina al caso de los embargos preventivos, porque en el procedimiento que se establece para dejarlo sin efecto, no cabe la discusion ni la prueba sobre la existencia de los danos y perjuicios, y porque la misma ley manda, a pesar de esto, que cuando por auto firme se deje sin efecto dicho embargo, se condene al actor a la indemnizacion de danos y perjuicios al demandado, haciendose estos efectivos en la forma establecida en el articulo 1417, que es por los tramites de los articulos 928 y siguientes. Estos tramites permiten la discusion y la prueba, no solo de la importancia, sino tambien de la existencia de los danos y perjuicios, si en esto se funda la oposicion, y por consiguiente, puede resolverse sobre uno y otro extremo sin necesidad de un nuevo juicio ordinario, que es precisamente lo que la ley se ha propuesto evitar.

against the plaintiff, who *shall* also be adjudged to indemnify the defendant for any losses and damages he may have incurred." The meaning is even more clear in the Spanish, where one verb takes the place of the words "be taxed" and "be adjudged" in this translation. The text is "se *condenera* al actor en todas las costas y a la indemnizacion de danos y perjuicios," which literally translated means "the plaintiff shall be condemned for all the costs and to the indemnity of the losses and damages." The final paragraph of the same article adds further strength to the contention. It provides that the costs and damages shall be adjudged *in the same order* of court by which the attachment is vacated. The Spanish is "en el auto en que asi se acuerde"—literally "in the order in which, etc." In Article 1413 the language is that "the costs, losses and damages *shall* be taxed against him." Here the damages and losses are *linked inseparably* with costs, which are ordinarily recoverable only in the action in which they are incurred and not by an independent action.

Article 1425 of the same title is still stronger. It is a part of Section 2 of that title. This section provides for an "intervention"—a sort of receivership—for taking possession of industrial and manufacturing establishments and similar going concerns pending a litigation as to their ownership. It proceeds along the general lines provided in the first section of that title for taking property on attachment and holding possession until the determination of the main action. Like an attachment, an intervention or receivership may be vacated, and, like an attachment also, when a

receivership is vacated costs, losses and damages are awarded.

The language of Article 1425 is as follows:

> "*Every* resolution vacating the intervention or canceling the security furnished *shall contain* the proper order with regard to costs and indemnification of losses and damages. The provisions of Article 1415 shall be observed for the recovery of the latter."

The Article 1415 referred to provides the manner of recovering losses and damages when an attachment is vacated.

The language of these several provisions, the cases already cited showing that it is the practice to recover damages in the attachment proceeding itself, the absence of any cases, if none have been found by counsel, upholding the right to recover in an independent action, and the very clear and definite comment of Sr. Manresa, above quoted, all seem to make conclusively for the proposition that damages of this special nature are recoverable only in the special manner thus so clearly and amply established in the law.

And it is not only proper but eminently reasonable that this should be so. Under our attachment acts a writ issues when the plaintiff has filed a proper bond with the clerk or sheriff. It is not, therefore, a judicial act. But under Spanish procedure an attachment may be made (Art. 1401) only upon the order of the court after a hearing. It is therefore, the judicial act of the court. The right of a defendant in attachment to recover against the plaintiff therefore arises not out of the mere fact that such an action has been commenced, but out of the seizure of his property ordered

by the court upon the petition and showing made by the plaintiff. The act of the court completes the defendant's right to damages when it appears from the subsequent vacation of the attachment by the court that it had been wrongfully made. Why should not the judge who ordered the attachment and subsequently ordered it vacated, and who therefore knows all the facts attending it and has heard the testimony and argument on the motions to grant and vacate, be the very judge who is most competent to pass on the question of damages? Why should the defendant be either compelled or permitted to institute another suit, with new pleadings and new service, and with its attendant delays and complications? Certainly it is a most logical disposition of law as well as most economical of the time of the courts and in cost to litigants, that the rights of the parties to an action in attachment, the costs and all the attendant and resulting obligations between the parties arising out of it, should be determined and adjusted in one final judgment by the judge by whose order the attachment was both made and vacated. And this, it is submitted, is the purpose of the provisions of Title XIV, to the exclusion of any other remedy. Says an old decision of the Supreme Court of Spain: "No hay doctrina juridica contra el texto de la ley," *Decision of October* 14, 1873—"Judicial theories have no place when contrary to the *text* of the law." Here the act of the court in ordering the attachment requested by the plaintiff was essential to give the defendant the right to recover damages against him. Certainly then it is a wise provision of law that requires and permits the court to follow its own act through to its logical

consequences, the assessment of costs and damages, and to pass on and control the rights arising out of an act in which he himself took an essential part. The law says that the matter of damages shall be settled and disposed of in the same action. That is the text of the law. Unless counsel can show by a concrete case that the Supreme Court of Spain has indulged a judicial theory contrary to this text of the law and has held that the matter of damages may be disposed of in an independent action in another court, it is submitted that this court ought not to indulge in such a theory.

The judgment of the court below should be reversed.

Respectfully submitted.

JAMES S. HARLAN,

JOHN MAYNARD HARLAN,

Attorneys for Plaintiff in Error.

FILE COPY.

Supreme Court U. S.
FILED
FEB 16 1906
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 1.

JOSE ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,
vs.
JOSE PEREZ Y FERNANDEZ,
Defendant in Error.

In error to the District Court of the United States for the District of Porto Rico.

REPLY FOR PLAINTIFF IN ERROR.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 1.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, *Plaintiff in Error,* vs. **JOSÉ PEREZ Y FERNANDEZ,** *Defendant in Error.*	In error to the District Court of the United States for the District of Porto Rico.

REPLY FOR PLAINTIFF IN ERROR.

I.

On the additional brief filed herein on behalf of the plaintiff in error pursuant to the order of the court of December 5, 1904, the writer, in discussing the third question propounded by the court, contended that no civil action like the one in this record was known to the laws and jurisprudence of Porto Rico at the time this action was instituted. It was also contended that, under the civil procedure existing in Porto Rico at the time of the attachment proceeding complained of in

this suit, the damages claimed herein could have been allowed and assessed *only in the attachment proceeding itself* when the attachment was dissolved. It is now admitted by counsel for the defendant in error that the Spanish laws then in force in Porto Rico (p. 27)

> made ample provision, in cases of wrongful attachment, for the assessment of damages, *in the attachment proceedings itself*, against the plaintiff wrong-doer in favor of the defendant who suffered loss or injury because thereof, and that in case of dispute as to the fact of damages or the amount thereof, specifically provided for the method of their ascertainment by articles 927 *et seq.* of the same code.

Moreover, it is to be inferred from the course of his argument that learned counsel admits also that the usual practice under the Spanish jurisprudence for recovering damages for a wrongful attachment is to make the application in the attachment proceeding itself. That this is the fact, is clearly shown by the cases cited on the additional brief for the plaintiff in error. (pp. 40-43.) But he seems to deny that this remedy was exclusive of any remedy by independent and separate action.

In the course of that discussion the writer, as pointed out by counsel (p. 34), reiterated the suggestion that if such a remedy existed under the Spanish law by an action independent of the attachment proceeding, counsel could best demonstrate the fact by citing decisions to that effect from the Spanish reports. From the time that has intervened between the filing of the additional brief for the plaintiff in error and that just filed on behalf of the defendant in error, it may well be assumed that counsel and his colleagues in this case have

spared no effort in the search for a precedent of that kind. The failure of counsel to produce such a citation and the writer's failure after an exhaustive examination to find such a case make it reasonably certain that no such ruling exists. Commenting upon this counsel seems to think (p. 38) that the mere absence of a decision on the point signifies nothing. In this view the writer is not able to concur. Certainly in connection with the very explicit provisions of law for assessing damages in the attachment proceeding itself, referred to in detail on the additional brief for the plaintiff in error (pp. 35-50), and in view of the commentary there cited (p. 46) of an eminent Spanish law writer in support of the very proposition here involved, and in view of the very logical and clear reasons why the judge who orders the attachment and subsequently orders it to be vacated (p. 49) should be the judge to pass on and control the question of damages arising out of his own judicial act, the absence of a single case upholding the right to recover by an independent action would at least seem to demonstrate and justify the belief of the entire bar and judiciary not only of Spain, but of the Philippines, Cuba and Porto Rico, that no such remedy exists. It is inconceivable that from all these widely separated Spanish speaking countries, whose commercial and domestic affairs were regulated by the same general system of laws, there should be not even a single instance in which an independent action had been instituted to enforce redress for damages suffered by a wrongful attachment. Certainly under such circumstances this American court would hesitate to be the first court to declare that such

an independent remedy did in fact exist under the Spanish jurisprudence.

Counsel states (p. 33) that "if it was necessary so to do, very respectable authority could be found" for the proposition that there is an independent action for damages for a wrongful attachment. As an example of such authority he has cited (p. 33-34) the *Decision of December* 16, 1903. So far from aiding his argument, it is insisted that the case on its very face and as stated by counsel himself, is an admirable ruling in favor of the contention of the plaintiff in error that there is no independent remedy by which damages may be recovered for a wrongful attachment. The facts in the case, as stated by counsel, are sufficient to show this. But it may be well to make a more complete statement of them.

The case then is this: José Llach had inherited a pharmacy from his father in Barcelona. In order to carry it on to better advantage, as he thought, he rented a store in a more central position in the city. Matters did not prosper well with him and from time to time he appealed to his mother-in-law, Madam Clot, for aid. Her advancements to him finally aggregated the sum of 19,000 *pesetas*. The greater portion of this debt was due and payable when, on June 30, 1890, by formal deed and in payment of his debt he assigned the entire property to his mother-in-law as her absolute property, with full right to dispose of it as she might deem wise. She then leased the whole enterprise back to him for a term of five years with the right to renew the lease, but upon the express condition that in case he failed to pay the rent for the premises occupied by him the lease

should *ipso facto* terminate, she to have the right of reentry. During the following year Mr. Llach failed to pay the rent and the owners of the store occupied by his pharmacy brought suit against him by attaching the medicines, furniture and other movable property in the pharmacy. They proceeded under the impression that the property seized belonged to Mr. Llach. Madam Clot, being the real owner, thereupon brought an action, known in the Spanish law as *terceria de dominio*, to recover the possession of the property seized on the attachment proceeding against her son-in-law. Her action was very much in the nature of our action of replevin. The owners of the premises, learning of her claim of title, abandoned the attachment. It is true that Madam Clot claimed damages against them for dispossessing her of her property; but it is to be noted that her claim for damages was made in and as a mere incident to the replevin proceeding. Damages were denied because she herself had arranged in the lease to her son-in-law that the property might remain in his possession, and the attachment had been abandoned before it was taken out of his possession. The court therefore held that she had not been damaged. The special point suggested by the case is that the Spanish law governing some of the actions in the general nature of replevin seems to provide, as in the case of attachments, for the adjustment *in the proceeding itself* of the losses and damages arising out of the disturbance of the possession of the owner. For an example of this see Art. 1656 of the Law of Civil Procedure.

From no point of view can the action of Madam Clot to recover damages for the disturbance by

the owners of the store of the possession of her property be said to be an independent action for damages for the wrongful attachment of her property. Her action in replevin was in no sense an action in tort. It was an action to try the *title to* or *right to possession* of the property involved. It was an action *to recover the property* and not an action to recover damages. As an incident to the effort to regain possession of what belonged to her, in which effort she succeeded, the law afforded her a claim for damages as a part of the self-same proceeding.

By citing that case counsel simply lends emphasis to the contention of the plaintiff in error that the place and the only place under the law for adjusting the claim of the defendant in error for damages arising out of the attachment here complained of was in the attachment proceeding itself. A careful examination of the provisions of the Spanish Code referred to in detail on the additional brief for plaintiff in error (pp. 35-49), together with the failure of counsel on both sides to find any precedent for an independent action for damages for wrongful attachment seems to demonstrate that there is no independent remedy and that the lower court in granting such a remedy in this case was exercising a jurisdiction that did not exist.

The *Decision of November* 26, 1857, which counsel cites (p. 37) does not seem to appear in the official reports. The *Decision of July* 6, 1885, does not relate to the attachment laws and is cited by counsel as having a bearing only "by way of analogy." As the laws relating to attachments contain special provisions requiring the damages to be adjudged in the

proceeding itself, the case cited seems to have no value in this discussion. He also cites the *Decision of April 7*, 1868, and quotes from it, (p. 37). This case arose under the old law of attachments and decides nothing except that when an attachment is vacated the plaintiff ought to pay the costs. Apparently the defendant did not claim to have been otherwise damaged.

The *Decision of June* 21, 1893, erroneously referred to by counsel, (p. 38), as of July 21, 1903, has no relation to this question. It is the case referred to by the writer on p. 45 (*q. v.*) of his additional brief in connection with a quotation (p. 46) from the edition of 1891 of the Commentaries on the Law of Civil Procedure by Sr. José Maria Manresa y Navarro. It has relation to the mortgage law of Spain and not to the attachment law; and it was held that there was no authority in the mortgage law in a proceeding to remove clouds, to adjudge damages against one who had put the cloud of record. It was in connection with that decision that Sr. Manresa, at the point cited, distinguished the rule applicable to such cases from the rule applicable to attachments. He there expressly states that the very purpose of the new attachment law in force at this time was to avoid a new suit to recover damages for a wrongful attachment and to provide for their recovery in the attachment action itself.

(See additional brief of plaintiff in error, p. 46.)

The quotation by counsel from an old edition of the Commentaries on the Law of Civil Procedure by Sr. Manresa is not without interest. It is useful in this

discussion because it lends support to the doctrine here contended for by the plaintiff in error. The author, it will be carefully noted and, as counsel points out, is dealing in that edition of his work not with the law of attachments in force at the time involved on this record, but with the old law of attachments. And Sr. Manresa has observed with care the omission, from Art. 939 of the old law, of a provision imposing upon the plaintiff the losses and damages as well as the costs when an attachment is vacated for reasons assigned in that article. He has also noted that the provision as to losses and damages is expressly included in Art. 940 of the old code. At the point quoted by counsel, the author, commenting on those two articles, draws the distinction between them with respect to the losses and damages which is required by this difference in language. When an attachment is vacated under Art. 940, the author shows that the costs, together with the losses and damages, are to be adjudged against the plaintiff in the attachment proceeding itself. But because of the omission to include losses and damages in Art. 939, he points out that, when the attachment is vacated for reasons specified in that article, only the costs can be imposed in the attachment proceeding; the losses and damages, as he thinks, being recovered in another suit. That edition of the author's commentaries is not available here, but such seems to be the meaning of the quotation made from it by counsel as it is translated on his brief (p. 35, 36). There are some obvious defects in the translation, and the original text would be of interest. For it will be observed that the purpose of the new suit, which the author seems to speak of, is "in order to fix their amount (*i. e.*, of

damages) according to paragraph 2 of article 63." The latter article, as counsel explains in the quotation, is equivalent to articles 927 *et seq.* of the new code, which refer only to an *incidental* proceeding in connection with some other main proceeding.

But in the present law of attachments there is no such omission. In Articles 1410, 1411, 1413, 1414, 1415, 1416, wherever costs are directed to be allowed against the plaintiff upon the vacation of an attachment, the new law is careful to provide that losses and damages shall also be adjudged against him in the same ruling. And the same author, as pointed out in the quotation from him made at p. 46 on the additional brief for the plaintiff in error, shows and expressly states that the very purpose of the new law was to avoid a new suit, the losses and damages being adjudged against the plaintiff in the same proceeding. The quotation by counsel from the old edition of this treatise seems to add interest to the distinction between the old law and the new, and to make it absolutely certain that under the present law an independent action does not exist.

Although counsel states (p. 38) that "much more might well be found by further search," he nevertheless has found nothing more. He has produced neither a decision by a court nor a statement by any law writer upholding his contention that this independent action in tort to recover damages for the alleged wrongful attachment was competent under the laws then in force in Porto Rico. On the contrary he is compelled to and does distinctly admit, (p. 37), that, under the first paragraph of article

1411, when an attachment is dissolved for one cause "*it is the duty of the judge to assess immediately the damages in that case.*" But he asserts that when an attachment is dissolved under the second paragraph of the same article "for any other cause" the language of that paragraph is directory only and the judge may or may not award damages in the proceeding itself as he may see fit.

This suggestion of an essential difference of meaning between the two paragraphs of article 1411 seems to be merely a strained effort on the part of counsel. There is nothing in the language of the two paragraphs to justify it. If Articles 1410, 1411, 1413, 1414, 1416 be read together it will be impossible to escape the conclusion that their clear intent and purpose is that the court *in the same ruling* by which the attachment is vacated *shall also determine* the liability of the plaintiff in attachment for the losses and damages suffered by the defendant. This seems to be especially clear from the language of the second paragraph of Art. 1411, which is the occasion of the distinction endeavored to be drawn by counsel. The provision there is that when an attachment is vacated "the *ruling* thereupon shall also *determine*" the liability of the plaintiff in attachment for the losses and damages suffered by the defendant. No language could be used which would more plainly or clearly impose upon the judge the duty of deciding the liability of the plaintiff for the damages. The utmost that can be said of the phrase "what may be proper according to the cases" as used in that clause is, that, when an attachment is vacated "for any other reason" not specified affirmatively in any of the articles in that chapter, the court may take an equitable

view, according to all the circumstances of the case, of the extent or amount of the plaintiff's liability. But in any event the language of that paragraph clearly requires the court to determine whether or not such liability in fact exists.

II.

The first twenty-seven pages of counsel's additional brief just filed herein are given over to the effort to respond to the proposition of the plaintiff in error that the Spanish jurisprudence is lacking in any department corresponding exactly to our law of torts and is lacking in a form of action exactly like our action in tort. Learned counsel has examined with some elaboration and care the civil code of France as well as the French decisions bearing upon the question. He has also examined the civil codes of other countries as well as that of Spain. And he has reached the conclusion that the law of torts is fully and completely developed in Spanish jurisprudence.

This question has perhaps something more than a merely academic interest in connection with this record. But in its most concrete and practical form the real question here involved is whether the laws then in force in Porto Rico contained provisions for awarding damages for a wrongful attachment in the attachment proceeding itself, and if so whether that remedy was exclusive of all other remedies. In the discussion of this question learned counsel has wholly failed to produce any authority to uphold his contention that there is an independent remedy, or to cast doubt upon the plain intent and meaning of those articles of the law of civil

procedure referred to on the brief for the plaintiff in error (pp. 46-50), which provide and require the damages to be assessed in the same proceeding.

For this reason the writer deems it unnecessary to follow further the discussion as to the Spanish law of torts and its application herein. He is content to rest upon what has heretofore been said on that question in his additional brief (pp. 26-32) and in the preceding pages.

The next seven pages of counsel's brief are devoted to the proposition that the attachment laws of Porto Rico then in force have no relation to this controversy, first, because the plaintiff in error was not a party plaiatiff to the original attachment proceeding; and, second, because the Federal court in which those proceedings were had was without authority, as counsel contends, to proceed in conformity with the code of civil procedure then in force in the island.

Of these two suggestions the latter is the more extraordinary. And it is difficult to follow counsel's course of reasoning in that connection and to ascertain clearly the exact thought in his mind. He points out (p. 29) that the original Federal court in Porto Rico had jurisdiction of all cases that would be cognizable by a circuit court of the United States, and (p. 30) that it was required to proceed in such cases as nearly as practicable as a circuit court of the United States would proceed. He then asserts that there is no procedure known in the Federal courts by which they are authorized to determine and assess damages for a wrongful attachment. Referring then to Sec. 914 of the Revised Statutes of the United States, he declares that

it neither helps the contention of the plaintiff in error nor throws any light upon the real point involved in this case. He deduces from his consideration of the whole question the proposition that even if it be true that the local laws required the trial court to assess the damages in the attachment action, this cannot be required of a Federal court because it would be contrary to the constitutional requirement and "laws governing the trial of issues of fact by a jury."

The writer must decline to enter upon any discussion of the constitution as applied to this case. For there is no place for such a discussion. No one can reasonably contend that any clauses of the constitution or any law of Congress now in force, could or would prohibit a Federal court in Illinois, for instance, from assessing damages against a plaintiff in attachment without the intervention of a jury if the state law so provided. If the attachment laws of Illinois permitted the court upon the vacation of an attachment to assess in the attachment action itself not only the costs against the plaintiff, but also the defendant's damages, and the plaintiff, with knowledge of that requirement of law, should resort to such a remedy against his debtor, it seems clear that he could not subsequently object to the assessment of the damages against him on the ground that he had a right to have them assessed by a jury.

The true view undoubtedly is that a Federal court sitting in a state, and consequently that the Federal court sitting in Porto Rico, cannot entertain jurisdiction or proceed in an attachment suit except in exact accordance with the provisions of the local law. And if for any reason, constitutional or otherwise, the

Federal court is not able to follow out and give effect to all the provisions of the local law, it cannot entertain jurisdiction in attachment at all.

In Waples on Attachment it is said (p. 325):

> Federal courts are bound to observe the statutes of the state courts. When trying an attachment cause in any state, a United States circuit court must give effect to the attachment laws there in force, and to their construction by the Supreme court of that state.

In *Bates et al.* v. *Days*, 17 Fed., 167, Judge McCrary said upon motion for rehearing (p. 170):

> The United States has no attachment law of its own, but its courts are required to administer the remedies by attachment which are provided by the law of the state in which such courts are held. Rev. Stat., Sec. 915.
>
> We must administer the attachment laws of the state as we find them and so as to afford to suitors in the federal courts the same remedies afforded to suitors in the state courts; neither more or less. * * * It may be true, as contended by counsel for plaintiffs, that there are difficulties in the way of the enforcement of this statute in the federal courts; but they are not insurmountable. If they were, the result would probably be to deprive this court of jurisdiction in attachment cases. *If this court cannot administer the remedies by attachment according to the statute of the state*, and afford to suitors all the remedies provided by those statutes, *it may be doubtful, to say the least, whether it ought to entertain a suit by attachment at all.* * * * It seems to me that this court should administer the whole statute, and not a part only.

In the same case Krekel, J., at p. 169, said:

> Federal and state courts are not foreign courts or in hostility to each other in administering jus-

> tice between litigants. The citizen of the state in the federal court is as much in his own court as in the courts of the state. The rights he has he cannot be deprived of in a federal court.

The second suggestion in that part of counsel's brief (p. 28), namely,—that the plaintiff in error was not a party plaintiff in the attachment proceeding and (p. 39) that if he could not be reached by the defendant in error by the independent action in tort, the defendant in error would be without any remedy against him,—is equally without merit.

In the first place Aguerria, the plaintiff in the original attachment proceeding, was the principal defendant in this proceeding. It was therefore an action to recover damages against the plaintiff in the attachment proceeding. As to such damages the law provides, as heretofore shown, that they may be recovered only in the attachment proceeding itself. The defendant in error therefore sought in this independent action to recover what, under the law, could not be so recovered. The mere fact that service was not made on Aguerria, who was also a resident of the island (Rec., 1), does not relieve the action from its essential character as being an independent action to recover damages against the plaintiff in attachment. If the agent Fernandez under the law can also be said to have been liable by reason of his participation in the attachment suit, there is no reason why, in the incidental proceeding required by law, he could not have been made a party, and his liability thus asserted and tested along with the alleged liability of Aguerria.

This suggestion by counsel affords further occasion for pointing out the great disorder and confusion that exists in Porto Rico because of the tendency of the Federal judicial authorities in that island to ignore the local laws. The law of attachments then in force in Porto Rico differs very radically from the law of attachments commonly in force in the United States. Here the issuing of the attachment writ is the ministerial act of the clerk of the court. Customarily he has authority to issue such a writ upon the filing of a bond together with an affidavit showing the existence of circumstances authorizing an attachment to be made. Under the Porto Rican laws the issuing of a writ of attachment is a judicial act and can only be ordered by the court upon a hearing. (Art. 1401.) Instead of such an affidavit as is generally required in the United States, the plaintiff under the Porto Rican law must make his showing in court before the judge. *No affidavit is required.* (See Title XIV, Section 1.) He must appear and support his petition for an attachment. That was the law of the island. But the Federal judicial authorities did not follow it in this case. The plaintiff in error was required to make an affidavit and attach it to the declaration. The clerk of the court thereupon issued the writ. It was a ministerial act and not a judicial act by the presiding judge of the court.

All this suggests that it is high time that by some announcement from this court the Federal court in Porto Rico be put on its true course with relation to the local system of laws.

III.

On the original brief filed on behalf of the defendant in error at the October Term, 1903, it was conceded by counsel (pp. 9-10), that this court may now consider and determine the contention of the plaintiff in error that the lower court was without jurisdiction to entertain this form of action and to decide the issues between the parties in accordance with the principles of the common law and in disregard of the local laws, pleading and practice then in force in Porto Rico. On the additional brief just filed herein on behalf of the defendant in error pursuant to the order of this court, it is again conceded (p. 7), that the court may now proceed to ascertain from the record whether the trial court in entering this judgment has exercised a jurisdiction that did not belong to it, as contended by the plaintiff in error. Both parties therefore have joined in answering in the affirmative the first question propounded by this court in its order of December 5, 1904.

There is however another ground upon which the court may take jurisdiction and revise the judgment entered in the court below. And although both parties have agreed that this court has jurisdiction on the grounds already suggested, the writer nevertheless ventures to make an additional suggestion touching that point.

It is this: It is well settled by repeated decisions in this court that when a case comes before it upon a writ of error the whole record is subject to the revisory power of the court and any error apparent upon

the face of the record may and indeed must be considered.

This general rule is well stated in *Suydam* v. *Williamson*, 20 How., 427, at p. 433 as follows:

> It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the Appellate Court, *any error apparent in any part of the record is within the revisory power of such tribunal.* The rule is, that *whenever the error is apparent on the record*, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner.

In *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 592, the language of the court is as follows (p. 600):

> Writs of error, it is true, bring up the whole record, and it is undeniably competent for the court to reverse the judgment *for apparent error*, whether it appear in the bill of exceptions *or in any other part of the record.*

In *Insurance Co.* v. *Piaggio*, 16 Wall., 378, it is said (p. 386):

> Errors apparent in other parts of the record may be re-examined, as well as those which are shown in the bill or bills of exceptions, and it is too plain for argument that the verdict and judgment are a part of the record. Whenever the error is apparent in the record, the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error *in the foundation, proceedings, judgment, or execution of a suit in a court of record.*

This rule has a very clear application to this case. Upon the original brief for the plaintiff in error (pp. 21, 22, 24), and on the additional brief (p. 11), it was shown that the statute creating and establishing the United States District Court for the District of Porto Rico, put that court in the exact status of a Federal court sitting in one of the states of the United States. Moreover this statute, after giving to the Federal court in Porto Rico the ordinary jurisdiction of a district court of the United States, also gives it the jurisdiction of a circuit court of the United States. And it provides that "it shall proceed therein *in the same manner* as a circuit court." In other words, the United States District Court for the District of Porto Rico, so far as the local laws are concerned, occupies exactly the position of a circuit court of the United States sitting in a state. It is therefore just as much bound as is a circuit court of the United States to the observance, with respect to the local laws of the island, of Section 721 of the Revised Statutes, which provides that in the Federal courts the laws of the several states shall be regarded as the rules of decision in trials at common law; and to the observance of Section 914, which requires Federal courts to conform "as near as may be" to the practice, pleadings, forms, etc., of the courts of record of the state in which they sit.

What was the purpose of Section 914 of the Revised Statutes of the United States, which requires the Federal courts in civil causes to conform "as near as may be" to the practice, pleadings, forms and modes of proceeding in the courts of record of the state within which

they sit? The question is clearly answered in *Nudd* v. *Burrows*, 91 U. S., 426. At p. 441 this court explains that provision of law in the following language:

> The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. *This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both.* The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes.

This view of the statute in question was approved in *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S., 291. After repeating the substance of the language above quoted from *Nudd* v. *Burrows*, the court gives application to the rule by saying (p. 300):

> Where a state law, in force when the act was passed, has abolished the different forms of action and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law *is undoubtedly obligatory upon the courts of the United States in that locality.*

If the abolition in Indiana of the common law forms of action and the substitution for them of one general form of action be binding upon a Federal court sitting

in that state, why should not a similar condition in Porto Rico be obligatory upon the Federal court sitting in that island? By the statute creating that court all the laws that apply to Federal courts in Indiana also apply to the Federal court of Porto Rico. Has the Federal court of Porto Rico the right to substitute common law forms of action in causes before it for the forms of action provided in the local law?

In *Lewis* v. *Gould*, 13 Blatchf., 216; 15 Fed. Cas., p. 483, the defendants moved to set aside a replication on the ground that it was a pleading not authorized by the local law. The motion was granted and the court, construing and applying section 914 of the Revised Statutes, says:

> No language can be more direct or plainer than this to convey the will of the congress, that the pleadings in the circuit and district courts shall be conformed to those employed in the state practice, "as near as may be." The qualification contained in this last phrase is not to be construed to subvert the command of the statute. "As near as may be" *allows only necessary variations* from the state methods, growing out of the different organization of the courts, and other similar matters.

It is also held in that case that common law forms of pleading are not only no longer necessary in the United States courts sitting in the State of New York, but they are *not admissible* except as they may be admitted to be a substantial compliance with the requirements of the local code of procedure.

If common law pleadings be not admissible in the Federal courts sitting in the State of New York because, under section 914, those courts are required to follow the pleadings and practice required by the state

code, what can justify the Federal court of Porto Rico in wholly ignoring and setting aside the local pleadings and practice and substituting for them the whole common law system of pleading and practice? Instead of following the local system "as near as may be," the Federal court of Porto Rico has ignored the duty to the people of that island and to the members of its Bar imposed upon it by that section of the revised statutes. Instead of conforming "as near as may be" to the local system with such "necessary variations" as may grow out of its different organization, it has simply adopted *en masse* the common law system of pleading and practice, which is altogether unknown to the local Bar.

In *Sears* v. *Eastburn*, 10 How., 187, it appears that the legislature of Alabama had abolished the fictitious proceedings in ejectment and substituted the action of trespass as the remedy for trying title to and recovering the possession of real estate. Such an action in trespass having been brought in the Circuit Court of the United States in Alabama, it was dismissed on the ground that the act of the local legislature abolishing the action in ejectment did not control in the Federal court. This court held that the dismissal was plainly erroneous, as the act of Congress of May, 1828,

> makes it *obligatory* upon the courts of the United States to conform in their mode of proceeding to the law of the state. The law of the state of itself, undoubtedly, was not obligatory upon the courts of the United States, *but it is made so by the act of Congress.*

If this act of the legislature of Alabama, abolishing one form of action and substituting another as the method for trying the title to real property in that state, be so far binding upon the Federal courts in

Alabama as to require the reversal of a judgment because the Federal court ignored the local law and insisted on an action in ejectment, how can this court permit the judgment herein to stand when it appears on the very face of the record that the lower court not only substituted a common law action for the action provided in the laws of the island, but tried and disposed of the case on common law pleadings and upon common law principles?

See also *B. & O. R. R. Co.* v. *Hamilton*, 16 Fed., 181.

Now it has been shown, and a merely casual examination of this record will demonstrate it beyond question or doubt, that from the beginning to the end of this proceeding the practice, pleadings and forms were those of the common law; and that the court proceeded without a thought as to the local practice, pleadings and forms and in utter and complete disregard of the whole local system of laws. Other records in this court from the same quarter show that the United States District Court for the District of Porto Rico deliberately follows the common law of England as the general basis of pleading, practice, forms and procedure in all causes, not equitable in their nature, that come before it; and that with equal deliberation it resolves questions of law involved in such causes in accordance with the principles of the common law. In this case, for example, the lower court tells the jury, composed of Porto Ricans (Rec., 72), that:

> This is an action styled in the law books an "*action upon the case.*" Stated in a different

> way, it is an action for a *malicious prosecution*, for the malicious suing out of an attachment—that is, that it was done without proper cause and with malice.

The "law books" here in the mind of the court were text-books relating to the common law. The "action upon the case" is a common law action and is unknown to the law of Porto Rico. And the talk that follows (Rec., 73) about malice and the right to presume malice is recognizable by all as plain, every day common law talk. The court made no pretense that it was based upon the local law. On the contrary the court told the jury (Rec., 75) that in the absence of probable cause for suing out the attachment they might presume that the attachment plaintiff acted with malice; and that if he had probable cause his act was not malicious and he could not be held in damages. This may be the test at common law. But the test under the local law of the right to recover damages was the mere vacation of the attachment and nothing else.

See Articles 1410, 1411, 1413 and 1415 of the *Law of Civil Procedure*. See, also, *Jerman* v. *Stewart*, 12 Fed., 266, where there is a ruling to the same effect under the code of Tennessee.

If the attachment was vacated by the court for any reason, the good faith of the attachment plaintiff in asking for it had no relation whatever to the duty of the court to award damages against him. The only thing left for the court to determine was whether any damages had in fact been suffered and if so, what was their amount.

This difference between the principles of the com-

mon law and the provisions of the local law was a very wide one. But the court did not stop there. He even said to the jury that "the plaintiff in this suit could not sue until the other suit was determined." (Rec., 75.) In the face of the provisions of the local law for assessing the damages in the attachment suit itself this part of the instructions of the court shows how fully he was following the general jurisdiction in relation to attachments as it exists in the common law states of the United States, and how far away he was from the local law. And throughout the record the court gave no indication of any kind, however slight, that it was concerned in any way as to what the law of the island might be in such a case.

This course it is contended is not only without warrant of law but works a hardship upon the local bar and is a real menace to the people of Porto Rico. Moreover it is just as great an affront to the people of Porto Rico and just as great an invasion of their rights as it would be to the people of the State of New York if a Federal judge of common law education should ignore the local codes of that state and enforce common law principles and common law pleadings and practice in his court. And it is earnestly submitted that the application in this case of the common law both with respect to the pleading and practice and procedure and forms and to the questions of law involved—*in* other words, the adjudication of the contention between the parties as if it were a common law action to be resolved in accordance with with common law principles—was error apparent on the face of the record of which this court, now that the point is raised, ought to and must take cognizance.

Even the tribal laws and customs of our American Indians have been accorded the dignity of being respected by the Federal courts, a dignity that has been denied by the lower court in this case to the laws of Porto Rico. In *Mackey* v. *Coxe*, 18 How., 100, this court held that the Cherokee Indians were governed by their own laws, and (p. 103) that there was

> no reason why the laws and proceedings of the Cherokee Territory, so far as relates to rights claimed under them, should not be placed upon the same footing as (the laws of) other Territories in the United States.

In *Davison* v. *Gibson*, 56 Fed., 443, there was a controversy as to the right of a husband to the personal property of his deceased wife, both of them being citizens of the Creek Nation. The opinion of Caldwell, Circuit Judge, sitting in the Circuit Court of Appeals, indicates that the trial court applied the common law to the solution of the controversy, and not the local laws of the Creek Nation. This was held to be error, and the judgment below was reversed and a new trial ordered, the court insisting that the controversy could only be decided in accordance with the local laws and customs of the Creek Nation, and that it was entirely anomalous to apply the common law of England, which had never been in force to regulate the domestic relations of the Indians of this country.

The action now before this court was entertained by the court below as a purely common law action. The process of the court and all its orders including its final judgment are in the form required at common law. The pleadings are those of the common law. The rulings on evidence and the instructions are all based

on common law principles. It was a common law proceeding in all respects as fully as if it had been tried in a common law state like Illinois. And it is insisted that it was error in the court below to entertain the action as a common law action or to proceed to dispose of it in accordance with common law practice and upon common law principles. Although no exception was preserved on this point, the error nevertheless appears upon the face of the record, and should now be considered by this court.

The case presents on the face of the record an error that strikes at the very foundation, not only of the judgment but of the whole proceeding. The proposition is that the court had no such jurisdiction as it exercised, that it could grant no such remedy and that the whole proceeding was erroneous from its inception to its conclusion.

In *Harvey v. Commonwealth of Virginia*, 20 Fed., 411 (p. 416), it is said:

> In regard to suits in equity, the states have no power, direct or indirect, over the procedure in federal courts; and it is questioned whether congress can confer it to any material extent. But the states have been clothed by congress with a large, though indirect control over the practice of the federal courts in common-law cases. Section 914 of the Revised Statutes of the United States provides, etc., etc. * * * This court is therefore authorized *to look into the laws of Virginia* relating to the practice prescribed to its courts in cases at law, and *to determine from those laws whether it has jurisdiction to entertain a proceeding like the one now under consideration.*

And this court, it is insisted, may now look into the laws of Porto Rico and determine whether the lower

court had jurisdiction to entertain a proceeding like the one on this record.

The judgment entered in the court below should be reversed.

Respectfully submitted,

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.



FILE COPY.

Office Supreme Court U. S.
FILED
MAY 15 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ
Defendant in Error.

No. 1.

In error to the District Court of the United States for the District of Porto Rico.

MOTION BY PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
ATTORNEYS FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ *Plaintiff in Error,* *vs.* **JOSÉ PEREZ Y FERNANDEZ** *Defendant in Error.*	**No. 1.**

In error to the District Court of the United States for the District of Porto Rico.

MOTION BY PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

Now comes the above named José Antonio Fernandez y Perez, plaintiff in error herein, by James S. Harlan and John Maynard Harlan, his attorneys, and suggests to the court that in connection with his petition to the lower court for the allowance of a writ of error herein this plaintiff in error presented a bond in the form required by law in such cases and requested that the writ of error might be made a supersedeas (Rec., 77, 78, 80, 82); that although a bond satisfactory

to the court was finally presented by this plaintiff in error and approved by the court, nevertheless the said court, for reasons not clearly understood by this plaintiff in error, declined to enter an order for a supersedeas (Rec., 93, 98); that in consequence an execution issued on the judgment herein (Rec., 90), which execution was subsequently levied on the property of this plaintiff in error and by means thereof the amount of the said judgment herein was collected.

The plaintiff in error therefore moves the court for an order to accompany its order of reversal herein, directing the lower court to cause an investigation to be made of the aforesaid facts and in case it shall appear that an execution has been issued and levied and the said judgment paid as aforesaid, that an order of restitution shall be issued by the lower court in accordance with the law and the practice in such cases.

Respectfuly submitted.

JOSE ANTONIO FERNANDEZ Y PEREZ.

A copy of this motion has been mailed to counsel for defendant in error at Washington, and notice given to him that the motion would be presented to the court on Monday, May 14, 1906.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

STATEMENT IN SUPPORT OF FOREGOING MOTION.

The record in this case shows that the plaintiff in error tendered a supersedeas bond to the lower court and filed a petition for a writ of error and supersedeas. There is some confusion in the record as to why the bond so tendered was not satisfactory. Apparently there was some objection to the surety on the bond. A new bond was then tendered and approved by the court. But the court held (Rec., 89) that it could not operate as a supersedeas. The defendant in error immediately made a motion that execution issue (Rec., 83), and execution was then issued (Rec., 90).

We are advised that the execution was subsequently levied upon the property of the plaintiff in error and the full amount of the judgment collected. This motion for an order to the lower court to issue a writ of restitution is made because, although that course is well established and has the authority of this court, there is not often occasion to resort to it, and it is thought that some direction by this court to the lower court may be useful.

Northwestern Fuel Co. v. *Broch*, 139 U. S., 216.

And see order of reversal in

Morris v. *U. S.*, 7 Wal., 578; *Morris Cotton*, 8 Wal., 507; *Ex parte Morris*, 9 Wal., 605.

The point in this suggestion is that the Federal Court in Porto Rico is a new court and unless some direction is issued to it by this court in this connec-

tion it is not improbable that the plaintiff in error will be put to the expense and suffer the delay incident to a new action to recover against the defendant in error.

Respectfully submitted,

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 18 1906

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, *Plaintiff in Error,* vs. **JOSÉ PEREZ Y FERNANDEZ,** *Defendant in Error.*	No. 1

In error to the District Court of the United States for the District of Porto Rico.

FURTHER SUGGESTIONS IN SUPPORT OF THE MOTION OF PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

Since the above mentioned motion was made herein, information has reached us showing that the execution in this case, which on the face of the record (Rec., 90) was made returnable sixty days after its date, was actually levied on the property of the plaintiff in error and the entire amount of the judgment and costs collected.

We are also advised that the defendant in error has

abandoned Porto Rico and has returned to live in Spain; that before leaving the island he transferred much, if not all, of his real estate to a friend and former agent. The plaintiff in error has reason to believe that this was not a *bona fide* conveyance but was colorable only and made by defendant in error in hope of evading his obligations to the plaintiff in error upon the reversal of the judgment herein. At any rate it is manifest that it will be impossible for the plaintiff in error to get service on the defendant in error in any *new* action brought against him to recover the amount due to the plaintiff in error under the order of reversal. All this suggests the propriety of the motion made and the need of some direction to the lower court in order that recovery may be had without delay or additional expense and *as a part of this proceeding*. In support of these suggestions an affidavit is hereto attached.

A copy of these suggestions has been mailed to counsel for defendant in error at Washington.

Respectfully submitted

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for plaintiff in error.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

James S. Harlan, being first duly sworn on oath, deposes and says that on Tuesday morning, May 15, 1906, he received from F. L. Cornwell, an attorney at law in active practice in Porto Rico and the attorney of the plaintiff in error herein in the lower court, a communication advising this affiant that José Perez y Fernandez, the defendant in error herein, had returned to Spain, apparently for the purpose of abandoning Porto Rico as a place of residence; that a short time before doing so he made a pretended conveyance of his real estate in that island to a friend and former agent; that said Cornwell and the plaintiff in error believe that this conveyance was colorable only and that it was made by the defendant in error in the effort and for the purpose of evading his obligations to the plaintiff in error upon the reversal of the judgment herein.

Further affiant saith not.

JAMES S. HARLAN,

Subscribed and sworn to before me this 16th day of May, A. D. 1906.

NINA M. BARNUM,
Notary Public.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 28 1904
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 81.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
Attorneys for Defendant in Error.

WAYNE MACVEAGH,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10608



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 51.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by Jose Perez against Jose Antonio Fernandez to recover damages sustained by the former as the result of the wrongful suing out and levying of an attachment by the latter.

Both parties are subjects of the King of Spain, residing in Porto Rico.

Rafael Diaz Aguerria was also named in the declaration and the writ of summons as a party defendant, but he was

returned *non est* by the marshal. No appearance was at any time entered in his behalf, and the cause proceeded as though he had never been named in it.

Plaintiff Perez alleged that for several years prior to January 4, 1900, he had been doing a general commission business at Mayaguez, Porto Rico, under the style of Perez, Ramos and Company; that he was the owner of many valuable real properties on the island, and individually and as a member of the above firm he enjoyed, both at home and in foreign countries, a large credit, and was in good commercial standing; that the defendant Fernandez, "for himself and as attorney-in-fact and agent of Rafael Diaz Aguerria," on or about January 4, 1900, in the United States Provisional Court for the Department of Porto Rico, did "falsely and maliciously and without reasonable or probable cause make an affidavit for attachment against the goods and property of plaintiff," and "wrongfully, vexatiously, maliciously and without probable cause caused an attachment to issue against the store and warehouse and the lot upon which the same was situated," in which he was conducting his business in Mayaguez, and also against other property in Porto Rico, all being of great value; that the attachment was levied by the marshal upon the properties mentioned, "all of which exceeded in value many times the amount of the debt for the collection whereof the said attachment was sued out;" that the alleged grounds of the attachment did not exist and the defendant did not have probable cause to believe that they did exist; that said suit and attachment proceedings instituted by the defendant had been judicially investigated by the district court of the United States for Porto Rico (as successor to the United States Pro-

visional Court for the Department of Porto Rico) prior to the bringing of this suit, and determined against the defendant; that by reason of such wrongful acts plaintiff's credit was destroyed, his stock of goods disarranged and injured, and he was compelled to retire from said firm, and thereby to lose a large amount of money. Wherefore he brings this suit to recover $20,000, made up as follows:

Loss of profits during pendency of attachment suit	$3,500.00
Traveling expenses	500.00
Counsel fees	1,000.00
Injury to business and credit	15,000.00

(Pp. 1, 2, and 3.)

The defendant Fernandez was served personally with summons (p. 5) and demurred to the declaration on the ground that it appeared on its face that he, Fernandez, "was acting as the duly authorized agent of the said Rafael Aguerria, and was neither principal nor party plaintiff to the said action to recover fifteen thousand pesos against Jose Perez" (p. 6). The demurrer was overruled (p. 7). Thereupon defendant entered a plea of "Not guilty" and "put himself on the country" (p. 7).

Plaintiff joined issue (p. 8), and after trial had the jury returned a verdict "for the plaintiff (for) seven thousand dollars ($7,000.00) in damages" (p. 24).

Motion for a new trial was filed (p. 24) and overruled (p. 25), and judgment was entered on the verdict (p. 25).

Plaintiff, to sustain his demand, introduced in evidence the record of the proceedings in the attachment cases before the provisional court, and also gave in certain oral evidence

tending to show his long career as a business man in the community, his high commercial standing both at home and abroad, prior to the wrongful levying of the attachment, and his loss of credit and expenses incurred as the result of such levy.

No exception to the admissibility of any of this evidence was preserved of record.

Plaintiff having rested, the defendant moved for a *nonsuit*, which motion was overruled (p. 71); and thereupon the defendant "offered certain testimony to maintain the issues on his behalf, but as no error is assigned in regard thereto the same is not set forth" in the bill of exceptions (p. 71).

Both sides having rested, the court charged the jury at length, advising it that the action at bar was "an action for a malicious prosecution, for the malicious suing out of an attachment—that is, that it was done without proper cause and with malice." "The question is, whether there was probable cause for it and whether it was done through malice;" defined "probable cause," and charged that if there was "no probable cause for the attachment, the law presumes malice."

"I say to you, gentlemen, that if, at the time that attachment was sued out on the 2d day of January, 1900, this defendant in this case, Fernandez, had reasonable grounds to believe, from all the circumstances existing, and that have been proven to you, that there was reasonable cause to believe that this Spanish gentleman for whom he was acting would lose his debt unless he took such steps as he did take, and he had a right to take under the law, then he is

protected in this suit, and your verdict in that event would be for the defendant. If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith—judging from all the testimony and all the circumstances—that there were no grounds for a reasonable man to believe that that debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment, and, although he was only acting for another as agent, it is tort and a wrong for which he is responsible, as well as the man he acted for. If there is no reasonable cause to believe he had grounds for an attachment, the law presumes he did it maliciously. That view, however, is liable to be rebutted by all the circumstances and evidence in the case; and you must determine whether —not that there was actual cause for suing it out—but whether, under all the circumstances, he had reasonable grounds to think, as a reasonably prudent man, that there were grounds for suing it out. You are also to determine from the evidence whether that presumption of malice is rebutted by the circumstances in the case. The law creating and keeping in existence the provisional court provided that attachments may be sued out of it upon the grounds that I have read to you, and upon which the defendant did sue it out. It is really, at last, a matter for you to determine, under all the testimony, whether it was done in good faith—whether it was done honestly—and not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out."

No exceptions of any kind were taken by either party to any portion of this charge.

The jury, having retired, returned its verdict as above.

Judgment was entered on the verdict as follows:

"Wherefore it is ordered and adjudged that plaintiff Jose Perez y Fernandez have and recover of Jose Fernandez y Perez the said sum of seven thousand dollars damages and his costs herein expended for which he shall have execution" (p. 25).

A writ of error from this court having been sued out, the plaintiff in error, defendant below, assigned errors as follows (p. 80):

1. The district court erred in overruling defendant's demurrer to plaintiff's declaration.

2. Said court erred in denying defendant's motion for a nonsuit, made by this defendant after plaintiff had introduced all his evidence in chief, *and before the offering of any testimony on behalf of defendant.*

3. The court erred in rendering a judgment against defendant alone, he having been sued jointly with another and no dismissal or *nonsuit* having been asked for or entered as to the other.

ARGUMENT.

The second and third assignments of error appear to have been abandoned, no argument in support of either appearing in the brief of plaintiff filed in this cause.

It is plain that defendant waived his motion for a *nonsuit* by introducing evidence in his own behalf after such motion had been overruled.

Bogk *vs.* Gassert, 149 U. S., 17, 23.
Union Pacific Railway *vs.* Daniels, 152 U. S., 684, 687.

That a verdict and judgment may be had against one of several defendants to the exclusion of the others in actions of tort is equally clear.

In such actions the liability of the defendants is joint and several. All persons liable, or any one or more of them, may be sued in the same action, and a recovery may be had against one or more or all of them in that action, or the plaintiff may, as he chooses, bring several actions against persons engaged in the same wrong-doing and may obtain several judgments for different amounts, but the acceptance of satisfaction of any one of the judgments will operate as a satisfaction of all.

Chaffee *vs.* U. S., 18 Wall., 516, 538.
Lovejoy *vs.* Murray, 3 Wall., 1, 10, 11.
Albright *vs.* McTighe, 49 Fed. Rep., 817, 820.
Cooley on Torts, 136.

The defendant Aguerria, though named in the declaration as a joint wrong-doer, was not served with process and took

no part in the progress of the case. The action being one of tort against several persons named as defendants, the plaintiff was entitled to recover against so many as the proof shows to have been guilty of the wrong.

Conner *vs.* Cockerill, 4 Cranch (C. C.), 3.

Milne *vs.* Huber, 3 McLean, 212.

"The rule undoubtedly is that where a verdict for damages for tort is rendered against one defendant only, judgment may be rendered thereon although other persons may have been joined as defendants under an averment that the tort was committed by all the defendants jointly."

Boswell *vs.* Gates, 56 Iowa, 143.

Jones *vs.* Grimmet, 4 W. Va., 104.

The verdict and judgment against one amounts to a dismissal of the cause as to the others.

Davis *vs.* Taylor, 41 Ill., 405.

JURISDICTION.

The first assignment of error is possibly broad enough to afford foundation for the argument as to want of jurisdiction in the United States district court for Porto Rico to entertain this cause, though it is to be noted that the ground of demurrer specifically assigned at the time of filing the demurrer itself was not related in any manner to jurisdiction or lack of it on the part of the court.

As the objection to the exercise of jurisdiction by the district court is based on the character of the subject-matter, and as in such respect the jurisdiction of courts cannot be enlarged by the assent of parties, express or implied, it would

seem that it is not too late to raise the objection for the first time here on appeal.

As stated by plaintiff in error, the point presented to the court is—

"that the lower court in entertaining this form of action and in hearing and deciding the issues between the parties in accordance with the principles of the common law of England and in disregard of the local laws, pleading and practice, then in force, was exercising a jurisdiction that did not belong to it, and the judgment rendered was therefore void and should be set aside."

It is asserted that an action to recover damages for personal injuries or for the wrongful or malicious injury wrought by one to the credit, business, or reputation of another is unknown to the Spanish civil law as administered in Porto Rico prior to American occupation, and that neither by statutory enactment nor by municipal or other regulation has the right to maintain such an action since been accorded to its inhabitants.

Objection is also made to the fact that the United States district court for Porto Rico in administering this cause adhered to the forms of practice and procedure established in and pertaining to Federal courts sitting in the United States.

If the objection of want of jurisdiction in the trial court be not well taken, it is certain that the objection to the forms of procedure to which litigants before its bar may be required to conform is without substance. If the former objection be well taken, the latter becomes immaterial.

By section 33 of the act of April 12, 1900 (31 Stats. L., 77; Supl. R. S., vol. 2, p. 1128), commonly called the Foraker act, the judicial power is

"vested in the courts and tribunals of Porto Rico as already established and now in operation including municipal courts, under and by virtue of general orders numbered one hundred and eighteen as promulgated by Brigadier General Davis, United States volunteers, August sixteenth eighteen hundred and ninety-nine and including also the police courts established by general orders numbered one hundred and ninety-five &c. * * * and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all of which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances and said general orders numbered one hundred and eighteen and one hundred and ninety-five, until otherwise provided by law."

By section 34 of said act Porto Rico is constituted a judicial district, and the district court of the United States for Porto Rico is provided for. In addition to the ordinary jurisdiction of district courts of the United States, this court is clothed with

"jurisdiction of all cases cognizant in the circuit courts of the United States" and is required to "proceed therein in the same manner as a circuit court."

"The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico" * * *

"The United States district court hereby established shall be the successor to the United States provisional court established by general orders numbered eighty-eight, promulgated by Brigadier General Davis, United States volunteers, and

shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

By section 35 of said act provision is made for writs of error and appeals from final decisions of the supreme court of Porto Rico and the district court of the United States to the Supreme Court of the United States "in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States," and it is also provided that—

"such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the United States."

Section 8 of said act declares

"That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, *or as altered or modified by military orders and decrees in force when this act shall take effect*, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The Civil Code in force in Porto Rico at the date of institution of this suit (War Department translation, Division of Insular Affairs, Oct., 1899), under Title XVI, "Obligations contracted without agreement," makes provision in "chapter first" for actions founded on "Quasi contracts," such as

those which (section 1) arise out of the management of another's business, and (section 2) out of the collection of what is not due. Chapter second of the same title is devoted to "Obligations which arise from fault or negligence."

Under the latter head the following provisions are interesting:

"Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage.

Art. 1904. A person who pays for the damage caused by his employees may recover from the latter what he may have paid.

Art. 1905. The possessor of an animal, or the one who uses the same, is liable for the damages it may cause, even when said animal should escape from him or stray.

This liability shall cease only in case the damage should arise from *force majeure* or from the fault of the person who may have suffered it.

Art. 1906. The owner of a game preserve shall be liable for the damage caused by the game to the neighboring estates, should he not have done what may have been necessary to avoid the increase of the same or should he have hindered the efforts of the owners of said estates to hunt.

Art. 1907. The owner of a building is liable for the damages which may result from the collapse of the whole or a part thereof, if it should occur through the absence of the necessary repairs.

Art. 1908. The owners shall also be liable for the damages caused—

1. By the explosion of machines which may not have been cared for with due diligence, and for kindling of explosive substances, which may not have been placed in a safe and proper place.

2. By excessive smoke, which may be noxious to persons or properties.

3. By the fall of trees, located in places of transit, when not caused by *force majeure*.

4. By the emanations of sewers or deposits of infectious matters, when constructed without precautions proper for the place where they are located.

Art 1909. Should the damages referred to in the two preceding articles arise from defects in construction, the third person who suffers it may only claim damages of the architect, or, in a proper case, of the constructor, within the legal period.

Art. 1910. The head of a family who dwells in a house, or in a part of the same, is liable for the damages caused by the things which may be thrown or which may fall therefrom."

The word "repair," appearing in article 1902 above, is defined by the Century Dictionary as follows:

"2. To make amends for, as for an injury, by an equivalent; to give indemnity for; make good; as, to repair a loss or damage."

It is more definite and positive than, though of same import as, the word "liable," appearing in the subsequent articles.

There is no indication from the chapter itself or any of its articles that the reparation to be made or the liability imposed is limited to cases where "the injury done is of a material character, capable of being definitely valued," as when a wagon or suit of clothes or other property on the person may be destroyed.

Nor is there any suggestion that the beneficent effects of the chapter are only to be invoked in connection with or as an incident to a criminal proceeding.

That an injury to a man's person through negligence, or to his reputation or credit through malice, constitutes a wrong is not to be doubted. That the Spanish Civil Code intended to recognize the possibility of such a wrong and to provide a remedy by which it should be redressed seems equally certain.

The contrary seems not to have occurred to either of the parties to this action or to their attorneys, in the course of the trial in the district court below.

Title VII, article 902 *et seq.*, of the Law of Civil Procedure for Cuba and Porto Rico, provides for the bringing of an action to establish civil liability of judges and associate justices "when, in the discharge of their duties, they violate the law through inexcusable negligence or ignorance."

Title XIV, article 1395, of the same Code, declares it to "be the duty of the judges of first instance to order pro-

visional seizures when requested, for the purpose of insuring the payment of a debt exceeding 1,000 pesetas."

Article 1399 defines the procedure to be pursued under certain circumstances, and declares that if the title presented should be other than one by virtue of which an execution can be ordered without further proceedings, the attachment shall "be ordered for the account and at the risk of the person requesting it."

Article 1400 of the same Code provides that—

"In the cases mentioned * * * if the person requesting the attachment should not be of well-known responsibility, the judge shall require him to furnish security sufficient to answer for the damages and costs which may be suffered or incurred.

"This security may be of any of the kinds allowed by law; but if the judge should allow a personal bond, he shall do so under his liability."

It thus appears that the civil law, as existing in Porto Rico, conclusively presumes that the person demanding a writ of attachment shall be liable to make good all damages and costs occasioned by its issuance. To this end the attaching creditor may be required to give a bond or other security; but if such be not taken, or when taken proves to be worthless, it seems that the injured party still has his right to proceed against the wrongdoer under article 1902 *supra*; otherwise there would be a wrong without a remedy, a condition as well obnoxious to the civil law of Spain as to the common law of England.

If the insular courts had jurisdiction to try cases of such character, it is certain that, given the requisite alienage of parties, the District Court of the United States for Porto Rico had jurisdiction of this cause.

The jurisdiction of the United States provisional court for the department of Porto Rico, of which court the present district court for Porto Rico is the successor, was defined by general orders No. 88, which is in part as follows:

General Orders, }
No. 88. }

HEADQUARTERS DEPARTMENT PUERTO RICO,
SAN JUAN, *June* 27, 1899.

I. In view of existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different States and of foreign States, violation of the United States postal laws, etc., and pursuant to authority from the President of the United States, conveyed by indorsement of April 14, 1899, from the Acting Secretary of War, and after full conference with the supreme court and members of the bar of the island, a United States provisional court is hereby established for the department of Puerto Rico.

II. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified.

III. Art. III, sec. 2, paragraph 1, of the Constitution is as follows:

1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

IV. The decisions of said court shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts. Its terms and places of sitting shall be fixed by the court at such times and places as may be most convenient for the parties litigant and to insure the expeditious transaction of business.

V. * * * The jury system may be introduced or dispensed with in any particular case, in the discretion of the court.

VI. The judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States.

* * * * * * *

VIII. In order to define more clearly certain branches of the criminal jurisdiction of the provisional court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

* * * * * * *

Fourth. Offenses committed by or against foreigners, or by or against citizens of another State, district or Territory of the United States residing in this department.

* * * * * * *

X. In civil actions when the amount in controversy is $50 or over, and in which any of the classes of persons above enumerated in paragraph VIII are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the provisional court: *Provided*, That in the determination of all suits to which Puerto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Puerto Rican laws, the court shall, as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law.

Report of Brig. Gen. Geo. W. Davis, U. S. V., on Civil Affairs of Puerto Rico, 1899, pages 117–118.

The provisional court was abolished by the Foraker act, but all alterations and modifications made in the laws and ordinances of Porto Rico by any "military orders and decrees in force when" that act took effect continued thereafter except as modified by Congress or the local legislature.

It is submitted that the district court of Porto Rico had jurisdiction of this action, and that no error occurred in the course of its administration.

The judgment of the United States district court for Porto Rico should be affirmed.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
Attorneys for Defendant in Error.

WAYNE MACVEAGH,
Of Counsel.

[redacted] COURT OF THE [redacted] STATES.

October Term, 1916.

No. 1.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

ABBREVIATED BRIEF FOR DEFENDANT IN ERROR PURSUANT TO DIRECTION OF THE COURT.

Francis H. Dexter,
Frederic D. McKenney,
John Sharpies Flannery,
Attorneys for Defendant in Error.

Byron S. Adams Printing Co. (Inc.), Printers, Washington, D. C. 1916

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 1.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Additional Brief for Defendant in Error Filed by Direction of the Court.

I.

Can this court, on the record of this case, properly consider and determine the contention of plaintiff in error that a civil action like the present one was at the date of the attachment and the commencement of this action unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

This action was instituted November 18, 1901, in the district court of the United States for the district of Porto Rico by plaintiff, Perez, who complained that *his business* and

credit as a merchant had been destroyed and his property and stock of goods had been greatly depreciated in value by the wrongful and malicious acts of the defendant, Fernandez.

The acts particularly complained of were that Fernandez, claiming to be acting as the attorney in fact and agent of one Rafael Diaz Aguerria, on or about the 4th day of January, 1900, in the United States provisional court for the department of Porto Rico, maliciously caused to be instituted in the name of said Aguerria a suit against said plaintiff, Perez, for 15,000 pesos, Porto Rican currency, and falsely and maliciously and without probable cause made and filed in said suit certain affidavits, upon the strength of which he caused an attachment to issue against plaintiff's store and warehouse, wherein the latter was conducting his business as a general commission merchant, and also against other property belonging to plaintiff, all situated in the island of Porto Rico, the aggregate value whereof was greatly in excess of the amount of the alleged debt. The attachment so caused to be issued by said Fernandez was levied upon said properties by the marshal of said United States provisional court, but thereafter, on or about the 4th day of June, 1901, the plaintiff's suit and the attachment proceedings connected therewith were by the district court of the United States for the district of Porto Rico determined against said Aguerria and in favor of the plaintiff herein, Perez, who now claims damages for the wrongs so suffered by him (R., 2–3).

To this declaration the defendant, Fernandez, interposed a general demurrer, expressly based upon the ground that it appeared upon the face of said declaration "that defendant, Jose Antonio Fernandez y Perez, was acting as the duly authorized agent of the said Rafael Aguerria, and *was neither principal nor party plaintiff to the said action to recover fifteen thousand (15,000) pesos against Jose Perez y Fernandez*" (R., 6).

This demurrer was overruled by the court (R., 7), and no exception to such action on the part of the court was taken by defendant. Afterwards defendant filed a plea of not guilty and put himself upon the country (R., 7), and issue having been joined on part of the plaintiff (R., 8) a jury was duly empaneled and sworn without objection by either party (R., 9).

On the trial plaintiff, Perez, introduced in evidence the record in the case of Rafael Diaz Aguerria, executor of Claudio Barro against Jose Perez y Fernandez (R., 30, *et seq.*), being the suit referred to in plaintiff's declaration herein, which contained, among other things, the affidavits of Fernandez (R., 31, 34) herein complained of, and showed the levying of a writ of attachment upon plaintiff's property (R., 33), and the subsequent dismissal of said case at the plaintiff Aguerria's cost on motion of the attorney for said Perez by the United States district court for the district of Porto Rico (R., 36), which court was by law the successor of the United States provisional court aforesaid, and had possession of all of the records of said court and jurisdiction of all cases and proceedings pending therein (act April 12, 1900, § 34).

Perez also introduced in evidence a certain decree of said United States district court for the district of Porto Rico, entered in the equity case of Jacinto Perez Barro *vs.* Rafael Diaz Aguerria and Jose Perez y Fernandez, perpetually enjoining said Rafael Diaz Aguerria, as foreign executor of Claudio Barro, from proceeding further, either in person or by agent or attorney, in the cause then pending against said Perez as aforesaid, and also certain oral testimony tending to show plaintiff's standing and credit at home and abroad as a merchant and the extent to which his business and his credit had suffered as the result of the malicious action of the defendant, Fernandez, in bringing about the institution of said attachment proceedings and securing the

levy of the writ of attachment issued in the course of said cause.

In the course of such evidence a witness, Jacinto Perez, being under examination, the following colloquy occurred:

Mr. DEXTER for plaintiff: "Q. State whether or not, if you know of your own knowledge, whether or not you or any of the heirs of Claudio Barros authorized Mr. Fernandez to institute any attachment suit against Mr. Perez?"

Mr. CORNWELL for defendant: "I object to that as Mr. Fernandez never instituted any attachment proceeding in the court; it was in the name of somebody else."

The COURT: "I do not think that question is proper. Suit was brought in the name of Agueria, executor, and the court ruled that a foreign executor, without first complying with certain conditions could not sue here."

Mr. DEXTER: "I propose to show by this witness that the proper parties, the heirs, the three heirs of Claudio Barros, that none of these people authorized this defendant here to institute such an attachment proceeding."

The COURT: "The record shows that this man was an executor in Spain * * * and that this suit was brought in his name. I take it that if the man believed in good faith—the defendant here— * * * and did not act maliciously, and for proper cause brought the suit in the name of the executor who was in Spain, and believed he had a right to bring it, it seems to me that is not malicious persecution" (R., 69).

Mr. DEXTER: "Q. Do you know of your own knowledge, whether the defendant in this case, Mr. Fernandez, represented the executor of Claudio Barros?"

The WITNESS: "A. According to what Mr. Fernandez told me, he had received a power from Mr. Aguerria, who was the executor of Claudio Barros" (R., 70).

The plaintiff having rested, the defendant introduced evidence in his own behalf, and the court having charged the jury, the latter returned a verdict for plaintiff in the sum of $7,000. A motion for a new trial having been overruled by the court (R., 24), judgment was entered upon said verdict in favor of the plaintiff, Perez, against the defendant, Fernandez (R., 25).

It will be noted that the defendant here, Fernandez, was not a party to the record in the attachment proceedings. He appeared therein not as a party plaintiff, but as an affidavit maker, asserting, among other things, that he held the power of attorney of the plaintiff named in said suit, viz: Rafael Diaz Aguerria, the executor of Claudio Barro, "and that Rafael Diaz Aguerria has a good cause of action therein," and that affiant has good reason to believe that the defendant (Perez) intends to and will fraudulently part with or conceal his property before judgment can be recovered against him, so that said judgment cannot be satisfied out of said property (R., 31).

By a second affidavit subsequently filed in the same cause, for the purpose of procuring the immediate issuance of the writ of attachment, said Fernandez further swore that said Perez was about to fraudulently conceal, dispose of, or mortgage his property so as to hinder or delay his creditors (R., 32).

Upon the question of defendant's liability in the pending suit the trial court charged the jury as follows:

"I say to you, gentlemen, that if, at the time that attachment was sued out on the 2d day of January, 1900, this defendant in this case, Fernandez, had reasonable grounds to believe, from all the circumstances existing, and that have been proven to you, that there was reasonable cause to believe that this Spanish gentleman for whom he was acting would lose his debt unless he took such steps as he did take, and he had a right to take under the law, then he is protected in this suit, and your verdict in that event would be for the defendant. If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith—judging from all the testimony and all the circumstances—that there were no grounds for a reasonable man to believe that that debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment, and, although he was only acting for another as agent, it is tort and a wrong for

which he is responsible, as well as the man he acted for. If there is no reasonable cause to believe he had grounds for an attachment, the law presumes he did it maliciously. That view, however, is liable to be rebutted by all the circumstances and evidence in the case; and you must determine whether—not that there was actual cause for suing it out—but whether, under all the circumstances, he had reasonable grounds to think, as a reasonably prudent man, that there were grounds for suing it out. You are also to determine from the evidence whether that presumption of malice is rebutted by the circumstances in the case. The law creating and keeping in existence the provisional court provided that attachments may be sued out of it upon the grounds that I have read to you, and upon which the defendant did sue it out. It is really, at last, a matter for you to determine, under all the testimony, whether it was done in good faith—whether it was done honestly—and not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out."

No objection to the jurisdiction of the trial court nor any objection whatever to the charge of the court to the jury was interposed by either party.

Unless want of jurisdiction in the trial court by reason of the subject-matter of the controversy appears from the face of the record, it would seem that the judgment under review must be sustained.

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen, under that general question, * * * there is a more general meaning to the phrase 'subject-matter' in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

Hunt *vs.* Hunt, 72 New York, 225.

What jurisdiction, if any, then, did the district court of the United States for the district of Porto Rico have at the time of the institution of this suit over actions of tort brought to recover damages for injury to one's business or credit suffered through the fault (*culpa*) of another?

It is asserted by counsel for plaintiff in error that an action to recover damages for personal injuries or for the wrongful or malicious injury wrought by one to the credit, business, or reputation of another is unknown to the Spanish civil law as administered in Porto Rico prior to American occupation, and that neither by statutory enactment nor by municipal or other regulation has the right to maintain such an action since been accorded to its inhabitants.

It is also said by the same learned counsel that

"the subject-matter of the action brought against the plaintiff in error * * * involved a claim that could not have been enforced against him under the local law. The lower court not only assumed jurisdiction in an action that was not authorized by law but it gave the defendant in error a remedy that did not exist under the law. In other words, it exercised a jurisdiction that did not belong to it."

The question thus presented is one of power in the trial court to act judicially upon the subject-matter in suit, and it may be conceded for the purposes of this argument that upon the record of the cause this court can properly consider and determine the contention of plaintiff in error that a civil action like the present one was at the date of the attachment and the commencement of this action unknown to and unauthorized by the laws and jurisprudence of Porto Rico (United States *vs.* Perot, 98 U. S., 428; United States *vs.* Chaves, 159 U. S., 459). This brings us to the immediate consideration of the second inquiry propounded by this court, which is as follows:

Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

It might perhaps serve to advance the argument somewhat if this inquiry should be extended by reference to cover the time of the institution of the pending action, for if a civil action like the present one was known to the laws and jurisprudence of Porto Rico at the time when the action was commenced in the district court for Porto Rico the prior existence of such a right of action at the time the attachment was sued out either follows as of course or, for reasons which will hereafter be made to appear, becomes of no moment.

Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and by the civil law from early times. Such actions have been administered in the Peninsula since the establishment of the Spanish monarchy, and have always occupied an important place in the jurisprudence of that nation. Such actions were countenanced in the Law of the Twelve Tables and in the Justinian Codes, upon which the Spanish system of laws was largely founded.

It matters not by what name an action shall be christened, whether by the attorneys who brought it or the judge who tried it, for the jurisdictional power of the court searches out the substance of the matter in dispute, irrespective of whether it be dubbed in English "trespass on the case for wrongful attachment" or styled in Spanish "indemnizacion de daños y perjuicios."

The body of laws called "Las Siete Partidas" were in force in Porto Rico until 1889, when by royal decree the Civil Code since in force was extended to that province. The Code of Civil Procedure, likewise so extended, became effective in said province January 1, 1886.

Law I of Las Siete Partidas (tit. XV, part 7) declares that damage is the loss of or detriment to one's property or person caused by the fault of another.

Law III of the same part declares that damages may be recovered from the tort feasor or from the one whose fault caused the damage; also from the person who ordered or advised the commission thereof.

The Civil Code, which superseded the Partidas, though preserving the general features of the former legislation, gives much evidence of having been influenced both in its form and principles by the Code Napoleon. For example, article 1902 of the Civil Code, which directly pertains to this discussion, reads:

"He who, by an act or omission, causes damage to another, fault (*culpa*) or negligence intervening, shall be obliged to repair the damage so done,"

while the corresponding articles of the Code Napoleon read as follows:

"Art. 1382. Every act whatever of man which causes damage to another obligates him by whose fault it has happened to make reparation.

"Art. 1383. Every person is responsible for the damage which he causes not only by his act, but also by his negligence or by his imprudence."

Similar provisions are also to be found in the Civil Codes of

Belgium, articles 1382 and 1383;
Netherlands, articles 1401 and 1402;
Austria, article 1295;
Switzerland, canton of Vaud, articles 1037 and 1038;
Chile, article 2314;
Guatemala, articles 2276 and 2277;
Uruguay, article 1280;
Argentina, article 1109.
Louisiana.

Speaking generally, it may be said that wherever the civil-law system prevails practically identical provisions will be found, for all civil-law codes find a common origin in the Law of the Twelve Tables and the Justinian Codes.

Upon the articles above mentioned many commentators have shed light both as to their scope and meaning.

Don Leon Bonel y Sanchez, in his Codigo Civil Español, vol. IV, p. 894 *et seq*, referring to article 1902 of the Spanish Code, says (as translated):

"We ought to recognize the fact that the article upon which we are commenting involves a true maxim of universal jurisprudence. It has as a basis the principle of eternal justice, 'sua cuique culpa nocet,'—the fault must not prejudice any one but its doer. The wrongdoer is obliged to repair any damage whatever which he may have occasioned to a third person through fault or negligence. The law may not have considered his act as amounting to a crime or misdemeanor and may not have established its punishment in the penal code. Therefore, the scope and scale of fault and negligence are so broad that all the cases cannot be comprehended in the provisions of a positive law, however casuistical it may be. The best way to reach good decisions in every case is to attend to the particular circumstances of the persons and facts."

And Toullier, in Le Droit Civil Français, volume 6, says (p. 94):

"121. Les acts nuisibles aux droits d'autrui sont naturellement divisés en deux grandes classes, qui les comprennent tous, sans exception:

"Attentats à la personne ou aux droits personnels d'autrui;

"Attentats à sa propriété ou à ses droits réels.

"La première class comprend toutes les atteintes à la sureté, à la liberté, à la réputation, ou à l'honneur des personnes, à l'exercise de leurs droits personnels.

"La seconde comprend tous les attentats contre la propriété ou les bieus d'autrui, lorsqu'on les dévaste ou détériore, lorsqu'on le prive de sa jouissance ou de sa possession, lorsqu'on attente à ses droits réels, lorsqu'on l'empêche d'en acquérir."

(Injurious acts to the rights of third persons are naturally divided into two great classes which embrace all of them without any exception:

Outrages against the person or the personal rights of another;

Outrages against another's right of ownership or another's real property rights.

The first class comprehends all of the violations of the security, *liberty, reputation, or honor of persons*, or of the exercise of the individual rights.

The second one involves all of the breaches against the right of ownership or property of another, when one destroys or damages the property of another, when one deprives the owner of its enjoyment or possession, when one invades another's real property rights, or when one hinders or prevents another from acquiring same.)

Notwithstanding the scholarly argument of counsel for plaintiff in error to the effect that the Spanish law makes (practically) no provision for the redress of wrongs by civil action as opposed to criminal prosecutions, we venture the assertion that the administration of the civil law in Spain and her dependencies in this regard did not at the time of the institution of this suit greatly differ from that administered in other civil-law countries, and apart from methods of procedure did not greatly differ from that in vogue in common-law countries.

In the administration of civil law generally there is a well-recognized distinction between the word "délit" (a wrong) when used in connection with civil and as used in criminal complaints.

Thus Aubry and Rau, under the title "Des Délits," explain the point (Cours de Droit Civil Français, vol. 4, § 443):

"Le mot *délit* a, en droit civil, une signification différente decelle dans laquelle il se prend en droit criminel. En

droit civil, il désigne toute action illicite par laquelle une personne lèse sciemment et méchamment les droits d'autrui. En droit criminel, il désigne toute infraction définie et punie par la loi pénale.

"Les délits civils ne constituent pas tous des délits de droit criminel; car la loi pénale n'incrimine pas tous les actes que portent atteinte aux droits d'autrui" (p. 745).

(The word delit (wrong or tort) has in civil law a different meaning from that which it has in criminal law. In civil law it means every illicit action by which a person knowingly and maliciously damages the rights of another. In criminal law it denotes all of the breaches defined and punished by the penal code. All civil wrongs do not constitute criminal wrongs (misdemeanors or crimes), for the penal law does not render criminal all acts which injure the rights of others.)

Citing the following example:

"Le stellionat n'est pas incriminé par la loi pénale quoiqu'il soit, en certain cas, un véritable délit civil."

(Fraud (false representation) is not denounced by the penal law, although in certain cases it may constitute a true civil wrong.)

And so the same commentators, in § 445 of their work, under the subtitle "De l'obligation de réparer le dommage occasionné par un délit," say (p. 748):

"Tout délit engendre l'obligation de réparer le dommage qui en est résulté pour autrui."

(Every wrong gives rise to an obligation to repair the damage which results from it to another.)

And again they say (p. 749):

"L'obligation de réparer le dommage causé par un délit pèse solidairement sur tous ceux qui y ont participé, comme auteurs principaux ou comme complices, lors même qu'il

s'agit d'un fait qui n'est pas incriminé par la loi pénale. Il en résulte que l'action en réparation d'un délit répréhensible à plusieurs personnes, peut être intentée contre l'une d'elles seulement.

"La réparation du dommage, soit matériel, soit moral, causé par un délit, se résout en une indemnité pécuniaire, sauf, en outre, s'il y a lieu, la restitution de l'object qui a fait la matière du délit. La fixation du montant de cette indemnité est, en général, abandonée à l'arbitrage des tribunaux."

(The obligation of repairing the damage caused by a tort rests jointly and severally upon all the wrongdoers whether principals or accessories, notwithstanding the fact that the thing done may not have been punishable by the penal law. Therefore, a recovery upon a tort attributable to several persons may be had against one of them only. The recovery for damages caused by a wrong whether the damages be material or moral, shall be settled by a money indemnity, without excluding in addition thereto (besides) if it be possible, the restitution of the object which was the matter of the wrong. The amount of the recovery is in general left to the judgment of the courts.)

In a note to the above the following occurs:

"Il en est ainsi, lors même que le dommage causé par un délit, ne constitue qu'un tort purement moral. Notre droit n'admet, en général, d'autre réparation qu'une indemnité pécuniaire. Ainsi, le juge ne peut, même au cas de délit d'injures, ordonner ce qu'on appelle une réparation d'honneur, a moins que la loi ne l'y autorise formellement" (p. 749).

(So it is, even when the damage caused by a wrong only constitutes a *purely moral injury*. Our law does not generally admit of any other reparation than a pecuniary one. Thus a judge in a case of abusive language (slander) is not able to order the making of an apology unless the law formally authorizes it.)

So M. Laurent, in Cours Elémentaire de Droit Civil, volume 3, observes (p. 207) :

"Suffit-il que le dommage soit moral? Oui, la loi est conçue dans les termes les plus généreaux, et la tradition est en ce sens. L'esprit de la loi ne laisse aucun doute, elle veut sauvegarder tous les droits de l'homme, tous ses biens; or, notre honneur, notre considération ne sento-ils pas le plus précieux des biens? Les Tribunaux prononcent tous les jours des dommages-intérêts pour délit de calomnie, commis par la voie de la presse, bien que le dommage soit purement moral."

(Is it sufficient that the injury (suffered) be a moral one? Yes, for the law is expressed in the most general terms and its construction should be in such manner. The spirit of the law permits of no doubt, it purports to safeguard all the rights of man, all of his possessions; now, our honor, our reputation, is it not the most precious of our possessions? The courts every day award damages for slander committed by the voice of the press, though the injury suffered be a purely moral one.)

In the light of such commentaries, even if the Jurisprudencia Civil should be barren of cases or decisions on the precise point, would it be difficult to maintain the jurisdictional power on the part of the Spanish tribunals to entertain actions to recover damages in cases arising from acts either of commission or omission, irrespective of whether the injury complained of was to the reputation, social or commercial, of the complainant or to his property or "bienes" alone?

We are not, however, required to rely solely upon the commentators for a definition as to the true scope and proper application of these articles and the prior laws which they superseded, for the "Jurisprudencia Civil" contains many decisions upon the matter.

For example, in the case of Leonardo García de Castro *versus* The "Compañía de los Ferrocarriles Andaluces,"

decided by the supreme court of Madrid on June 27, 1894, it was held that the plaintiff, who was injured by one of the trains of the defendant company by reason of the negligence of the latter, was entitled to recover damages for the injuries caused to his health, moral condition, business, and interest.

Official Gazette of Madrid, November 8, 1894, p. 220.
Jurisprudencia Codigo Civil, by V. A. M., &c., vol. 2, pp. 542, 547.

In the case of Doña Juana Alonzo de Lara *versus* Don Manuel Chacón *et al.*, decided by the same court December 14, 1894, it was held that the plaintiff had a right of action under said section 1902 for damages for the death of her husband, who was an employee of defendants and fell from a building belonging to them because of their negligence in providing safe means of passage.

Jurisprudencia Codigo Civil, by V. A. M., &c., vol. 3, pp. 62.

And likewise in the case of Canales *vs.* Marianao Railroad Company, decided by the same court May 16, 1893, there was held what is already conceded by our opponents to exist, viz., the right of an injured plaintiff to recover damages for injury to personal chattels.

Ibid., pp. 239, 243.
Official Gazette of Madrid, October 2, 1893, p. 147.

It will be at once noted that the first and second of these references pertain to cases of injury neither to the person nor to real or personal "biens" and involve injuries incapable of exact valuation in money and of more or less indefinite nature, such as the impairment of health, injury to one's business, moral wrongs, the injury to a wife growing out of the negligent killing of her husband, while the third covers damages to property capable of exact definition and ap-

praisement. The courts of France, construing articles 1382 and 1383 of the French Code, which correspond to articles 1902 and 1903 of the Spanish Code, have frequently construed such articles to favor recovery in cases where the damages complained of were of a moral as well as a material nature.

For instance it is said (translation):

The principle established by article 1382 is as general as possible. It receives its application even in the case of an improper exercise of one's rights.

As a matter of principle, every one has a right of action to claim what he may think to be his property or his credit and also a right to defend himself in any suit whatsoever brought against him; but the improper or abusive exercise of both rights constitute an act of malice and *mala fide*, or even a gross fault equivalent to fraud.

The jurisprudence of the courts have been constantly applied in that way.

See decisions of the court of cassation of France of December 24, 1894, February 5, 1894, December 1, 1896, and April 22, 1898, reported at page 959 of "Précis de Droit Civil, by G. Baudry-Lacantinerie, volume 2."

And the same tribunal has also observed:

"La défense en justice est encore un droit dont l'exercice peut dégénérer en faut donnant ouverture à des dommages-intérêts, lorsqu'une demande est repoussée comme ayant été introduite sans aucon intéret legitime et dans un but uniquement vexatoire."

(The exercise of a right of action improperly may give rise to claims for damages if the suit be dismissed upon the ground that it was instituted without lawful interest and with vexatious intent.)

Court of Cassation, France, May 9, 1893; Commentaire Théorique et Pratique du Code Civil, Huc, vol. 8, p. 547.

"Le dommage subi peut être simplement moral, comme dans le cas ou un individu a été porté malgré lui sur une liste des candidats. Celui qui a fait imprimer et distribuer la liste sera passible des juste dommage."

(The damage may be merely a moral one, as in the case where an individual in spite of himself has been named upon a list of candidates (for office). He who prints and distributes the list will be liable for damages.)

Court of Nancy, France, March 8, 1893, Commentaire, etc. (next above), p. 548.

In the days of the "Partidas" the Supreme Court of Madrid, as a necessary concomitant of the action for damages growing out of wrongs, declared that to sustain a recovery in such cases it is necessary that the damage be done through the fault, fraud, or malice of the doer.

Jurisprudencia Civil, Decision No. 329, vol. 37, p. 360.
Ibid, Decision 255, vol. 55, p. 403.

As has perhaps already sufficiently appeared, the right to recover damages for a wrong inflicted upon another is not at all dependent upon the question whether the particular act complained of as causing the damages for which reparation is demanded was punishable by the Criminal Code or not. It is true that in the administration of justice the Spanish code provides for an award of damages in some instances in connection with or as parcel of a criminal proceeding, but this does not in any wise militate against the independent right of action which arises out of acts of omission or commission embracing all degrees of intention, from negligence which occurs without intention to positive acts denominated and defined as crimes.

It is difficult to say whether any act or an omission amounts to a crime or misdemeanor without looking into

the provisions of the Penal Code. An act may be illegal and, nevertheless, not be a crime because the Penal Code does not so nominate it, and, on the contrary, an act may have all the appearance of innocence and, nevertheless, be a crime or misdemeanor because punished by the said Code.

Sometimes an omission occurring through fault or negligence may also amount to a crime or misdemeanor.

The principle "*ubi non est lex nec prævaricatio*" governs in an inquiry as to whether a certain act or omission amounts to a criminal offense.

But in an inquiry as to whether a certain act or omission gives rise to civil responsibility, the substantive law answers for itself.

The language of article 1089 of the Civil Code of Porto Rico "and by illicit acts or omissions, or by those in which any kind of fault or negligence occurs," could not be more comprehensive or clear.

So, where our rights or persons are injured, in any case whatever, we may seek redress through a civil remedy, regardless of a criminal prosecution.

The Penal Code and the Code of Criminal Procedure, instead of being a bar to the exercise of civil remedies, contain many provisions granting the civil remedy in all cases and permitting its exercise before the civil courts according to the civil laws.

Pertinent articles of the Penal Code in force at Porto Rico in 1901 are as follows, viz:

"Art. 16. Every person criminally liable for a crime or misdemeanor is also civilly liable."

"Art. 119. The civil liability established in chapter II, title II, of this book includes: (1) Restitution, (2) reparation of the damage caused, (3) indemnification for losses, (4) enforced manumission."

"Art. 133. Civil liability arising out of crimes or misdemeanors shall be extinguished in the same manner as other obligations in accordance with the rules of civil law."

See also the whole title II, chapter I, Book 1, and title IV, Book 1, of the Penal Code.

The act or omission may fall under the provision of article 1902 of the Civil Code when there is fault or negligence of any kind, or it may pass the limits fixed in such article and fall under the provisions of the Penal Code. In both cases, regardless of whether the act or omission constitutes a public or private criminal offense or whether it is not a criminal offense at all, a civil redress is granted by the Spanish law, and a civil action may be brought in accordance with the provisions of the Civil Code and the Code of Civil Procedure before a court of civil jurisdiction.

If there is a provision of the Penal Code punishing the act or omission which caused the damage, even if it happened through fault and negligence only, then the person injured has two independent remedies which he may exercise in the same action or by separate action; that is to say, he may appeal to the criminal court for the prosecution of the offense and institute a civil action therein, or he may appeal to the civil court asking for damages regardless of the criminal prosecution. If, on the contrary, there is no provision in the Penal Code punishing the act or omission, even if it is illicit, then the person injured has but one remedy, viz., the civil one. Of course, if it is a case of a public criminal offense and the criminal action is going on, he cannot bring separately the civil action until the former has been decided by final sentence.

As bearing upon the above note the following provisions of the Code of Criminal Procedure:

"Art. 3. As a general rule, the jurisdiction of courts charged with penal justice extends to the decisions for the purpose of reprehension only, of the preliminary civil and administrative questions arising in connection with the acts prosecuted, when such questions appear to be so intimately connected with the punishable act that their separation is practically impossible."

"Art. 4. Nevertheless, if the preliminary question be one involving a determination of guilt or innocence, the criminal court shall suspend the proceedings until the decision

thereof by the proper person; but it may fix a period not to exceed two months, within which the parties may apply to the civil or administrative judge or court of competent jurisdiction.

"If said period shall expire without the person interested proving that he has availed himself thereof, the criminal court shall raise the suspension and continue the proceedings.

"The prosecuting official shall be a party to these proceedings."

"Art. 6. If the civil preliminary question shall relate to the right of ownership of real property or of another property right, the criminal court may decide thereon when such rights appear to be based on an authentic title or indubitable acts of possession."

"Art. 7. The criminal court shall conform to the rules of civil or administrative law, respectively, in the preliminary questions which it may be required to decide, in accordance with the preceding articles."

"Art. 100. A criminal action arises from every crime or misdemeanor for the punishment of the culprit, and a civil action may also arise for the restitution of the thing, the repair of the damage, and indemnity for the losses caused by the punishable act."

"Art. 107. The abandonment of the civil action or of a criminal action which can be abandoned shall only prejudice the person who abandons it; the other persons interested in the cause being permitted to continue the criminal action in the state it was, or institute a new one."

"Art. 108. The civil action must be brought jointly with the criminal action by the prosecuting official, whether there be a private accuser or not in the cause; but if the person offended shall expressly renounce his right to restitution, repair or indemnity, the prosecuting official shall confine himself to requesting the punishment of the guilty party." (Note, this governs in cases of "delitos de accion publica.")

"Art. 109. As soon as the declaration of an offended party having the necessary legal capacity has been received, he shall be informed of his rights to become a party to the action and to renounce or not the restitution of the thing, repair of the damage, and indemnity for the loss caused by the punishable act."

* * * * * * *

"Art. 110. Those prejudiced by a crime or misdemeanor who shall not have renounced their rights may enter an appearance in the cause should they do so before the classification of the crime, and exercise the proper civil and criminal actions, or either, as they may desire, without, however, causing any retrogression in the course of the proceedings.

"Even if the persons prejudiced do not enter an appearance in the cause, it shall be not understood that they thereby renounce the right to restitution, repair or indemnity which may be granted them by final sentence, it being necessary that renunciation of this right be made in a proper case in an express and positive manner."

"Art. 111. The actions which arise from a crime or misdemeanor may be instituted jointly or separately; but during the pendency of the criminal action the civil action cannot be brought separately until the former has been decided by a final sentence, excepting always the provisions of articles 4, 5, and 6 of this Code." (Note, this seems to govern in cases of delitos de accion privada.)

"Art. 112. If the criminal action only is instituted, it shall be understood that a civil action may also be brought, unless the person injured or prejudiced renounces the same or expressly reserves the right to institute it after the conclusion of the criminal action, if necessary.

"If only the civil action arising from a crime which can be prosecuted only on a private complaint is instituted, the criminal action shall thereby be considered as extinguished."

"Art. 113. The two actions may be expressly instituted by the same or by different persons; but should the actions derived from a crime or misdemeanor be instituted by two or more persons, they shall do so in one proceeding, and if possible with the same counsel in the discretion of the court."

"Art. 114. If a criminal action is brought to investigate a crime or misdemeanor, a suit cannot be prosecuted in the same; the proceeding being suspended, should any be pending, in the State in which it may be, until final sentence has been pronounced in the criminal case.

"It shall not be necessary for the institution of the criminal action that it shall have been preceded by the civil action arising from the same crime or misdemeanor.

"The provisions of this article shall be understood without

prejudice to those of chapter II, title I, of this book, with reference to preliminary questions."

"Art. 115. A criminal action is extinguished by the death of the culprit; but in such case a civil action still lies against his heirs and successors in right, which can only be brought in a civil court and through civil channels."

"Art. 116. The extinction of the criminal action does not carry with it the extinction of the civil action, unless the extinction be caused by a final sentence declaring that the act on which a civil action might be based did not exist.

"In other cases the person having a right of civil action may institute before the civil jurisdiction, and through the proper civil channels, an action against the person who may be obliged to restore the thing, to repair the damage, or to indemnify the losses suffered."

"Art. 117. Nor does the extinction of the civil action extinguish the criminal action resulting from the same crime or misdemeanor.

"A final judgment absolving from liability rendered in the suit brought by the exercise of the right of civil action, shall not bar the exercise of the proper right of criminal action.

"The provisions of this article are to be understood without prejudice to the provisions of chapter II, title I, of this book and of articles 106, 107, 110, and second paragraph of article 112."

Although there is apparent confusion in the foregoing provisions as to the way and time of instituting the penal and civil actions arising from the acts or omissions complained of, the supreme court of Madrid has removed all the doubts on the subject.

For instance, in a decision rendered on March 23, 1882, the following principle was laid down, to wit:

"Where a person is prejudiced by an act which gives rise to a criminal prosecution he may institute jointly or separately the penal and the civil action arising therefrom; but it shall be presumed that the civil action is instituted jointly with the penal action unless he renounces or expressly reserves the civil action; but if he institutes both actions jointly he ought to be bound by the consequences of the proceeding to which he voluntarily submitted himself and shall

not take advantage afterwards in another proceeding of the civil remedy based upon the same cause of action, because the *res judicata* is a bar thereto."

Reported under number 101 in volume 48, page 394 of the Jurisprudencia Civil.

In its decision of June 14, 1886, the same court said:

"Although the penal responsibility embraces and carries with itself the civil liability arising from the same crime or misdemeanor, and although according to article 111 of the Code of Criminal Procedure the one and the other may be enforced jointly or separately, nevertheless, in order to enforce the civil responsibility it is necessary to observe the laws establishing and regulating the exercise of the civil action."

Reported under number 28, volume 60, page 120.

The reports of the supreme court of Madrid are full of decisions awarding damages in cases arising both from contracts and from acts and omissions occurring through fault and negligence or acts amounting to crimes and misdemeanors. The fact that said court has taken jurisdiction in the latter cases is of itself conclusive of our contention that a civil action arising from an act amounting to a crime or misdemeanor may be instituted before a civil court regardless of the pendency of the criminal prosecution (except in cases above noted), for said supreme court possesses civil jurisdiction alone, as it has frequently proclaimed in its decisions.

For instance, in its decision number 28, volume 60, June 14, 1886 (*supra*), the court said, viz:

"Whereas the infraction of the royal decree of June 20th 1852 governing the cases of smuggling and defraudation cannot authorize the taking of one of the appeals of which this court takes cognizance because, as the said court has always declared, it only deals with civil cases, which are the only matters of which it takes jurisdiction, and the aforesaid royal decree is of a penal tendency and nature."

In dealing with the subject of "civil actions" (Diccionario, &c., &c., Alcubella) the following passage occurs (vol. 1, p. 122):

"Let us consider the principal civil actions:

"CIVIL ACTIONS ARISING FROM CRIMES.—*Every person* criminally liable for a crime or misdemeanor is also civilly liable, says article 18 of the Penal Code (16 of the Code of Porto Rico); it follows from said principle that from *every* crime or misdemeanor arises a civil action on behalf of the prejudiced party to obtain the restitution of the property which was the object of the criminal act, the repair of the damage done or the indemnification of the loss caused."

* * * * * * *

It thus appears that article 1902 of the Civil Code is not the only article under which a person injured may recover damages for wrongs not growing out of contracts, for it is certain that the civil courts have jurisdiction over the civil liabilities arising from malicious acts also.

The words "fault or negligence," as used in article 1902 of the Civil Code, are not synonymous, because "fault" consists not only in omitting to do whatever we are bound to do, but also in the doing of something which we ought not to do, while "negligence" consists in an omission to do what we ought to do.

To be in "fault" is not equivalent to having acted without diligence, because one may be in "fault" for having acted with excess of diligence, as in the case of an adversary.

All the commentators speak of "fault" in contradistinction to "malice," and in case at bar it was affirmed in the declaration that Fernandez, in connection with the attachment proceedings, acted maliciously.

Still, if it should be thought that the acts of Fernandez were such as rendered him liable under the provisions of

the Penal Code, he was none the less liable to civil action in the independent proceeding in the civil courts.

In this connection it should be borne in mind that there are two kinds of "delitos" or crimes known to the Spanish law, viz, "delitos de accion publica," crimes of public action, and "delitos de accion privada," crimes of private action. In the former the public peace and order is involved, and they must be prosecuted, irrespective of the wishes of the party particularly injured or offended, and the proceedings may be commenced without indictment. In the latter the disposition of the party injured is permitted to have play, and in all such cases the proceeding must be based upon an indictment. In the former class of cases the civil demand must be brought in connection with the criminal action, and an acquittal of the crime charged destroys the right to recover in the civil action (Code of Civil Procedure, art. 108); but this is not so with respect to the latter class of cases, for in this class the civil action ought not and, indeed, cannot be brought jointly with the criminal action (articles 111–117, Code Crim. Proced., *supra*), and is not dependent upon its maintenance. This distinction seems not to have been noticed by counsel for plaintiff in error.

That the provincial courts of Spain local to Porto Rico possessed full judicial powers concerning demands for indemnity growing out of malicious acts where the detriment or injury suffered was of a purely moral character—that is, to the person, to the reputation or business standing, or to the feelings—cannot reasonably be doubted.

That such damage or indemnity was generally recoverable in civil actions before the tribunals sitting as civil and not criminal courts seems to be equally clear.

The terms of article 1902 of the Civil Code above discussed are of the most general character and application. Unrestrained by any other provisions, either additional or

special, they would undoubtedly cover a case like the present one. If the local insular courts had jurisdiction of such a cause of action, it cannot be doubted, the requisite citizenship and amount being present, that the district court of the United States for Porto Rico likewise had jurisdiction thereof, for section 34 of the act of Congress of April 12, 1900 (31 Stats., 77), establishing that court, expressly declares that in addition to the ordinary jurisdiction of district courts of the United States it shall have "jurisdiction of all cases cognizant in the circuit courts of the United States," and in all such cases it is required to "proceed therein in the same manner as a circuit court."

As the courts of Porto Rico had judicial power to investigate and determine actions to recover indemnity for damages to persons or property growing out of malicious or negligent acts, it would seem beyond dispute that such actions were also cognizable by the district court of the United States for the district of Porto Rico.

If said district court had jurisdiction to adjudge between the parties as to the subject-matter of this cause, as from the foregoing it appears to have had, then the judgment complained of must be sustained, for it was entirely competent for the parties to waive all questions growing out of or pertaining to the administration of the cause—that is, so far at least as matters of pure procedure are concerned. Apart from the demurrer to the declaration, on the ground that it stated no cause of action against the defendant because the acts of defendant complained of therein thereby appeared to have been committed by him when acting as the duly authorized agent of another (Aguerria), no objection to the course of procedure adopted to try the issues joined appears anywhere in the record.

Counsel for both parties, assuming the trial court to be possessed of requisite jurisdiction to hear and determine the cause, readily acquiesced in a course of procedure which was

entirely familiar to all actively engaged in the conduct of the trial.

But it is said that the right of Perez to recover damages against Fernandez for the wrong complained of could only have been enforced under the local law in and as a part of the original attachment proceeding; that the only remedy open to the former was the presentation of his claim for damages to the judge at the time of final disposition of the attachment. This brings us to the third question propounded by this court, as follows:

Under the law of civil procedure, as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?

Admitting, for the purposes of argument, that the Spanish law in force in Porto Rico at the time of the levying of the attachment in the case of Aguerria *vs.* Perez made ample provision in cases of wrongful attachment for the assessment of damages *in the attachment proceedings itself* against the plaintiff wrong-doer in favor of the defendant, who suffered loss or injury because thereof (articles 1409–1415 of the Code of Civil Procedure), and that in case of dispute as to the fact of damages or the amount thereof, specifically provided for the method of their ascertainment by articles 927 *et seq.* of the same Code, how does that affect the present case?

Article 1411 of said Code declares that where the attachment is discharged for certain reasons "costs shall be taxed against the *plaintiff, who shall also be adjudged to indemnify*

the defendant for any losses and damages he may have incurred;" and also that where the attachment shall have been vacated for other reasons the ruling thereupon shall also determine what may be proper "with regard to cost and indemnification of losses and damages which may have been suffered."

Article 1415 provides that losses and damages adjudicated *against the plaintiff* in attachment in accordance with the preceding articles shall be recovered "according to the procedure established in articles 927 *et seq.*," and article 1416, which deals with the assessment of costs and damages by the municipal judge in cases of debt of less than 1,000 pesetas (see article 1395), provides that if judgment be rendered for the defendant "all the costs shall be taxed *against the plaintiff*. He shall also adjudge *him* to pay the loss and damages, fixing the amount thereof, if the defendant should have requested it in the action."

Articles 927 *et seq.*, so referred to, cover the cases of assessment of damages as between the judgment creditor and the judgment debtor, parties to the attachment proceedings; articles 928 and 929 provide for the cases where the judgment debtor and judgment creditor agree as to the amount of the losses and damages which have been sustained, and article 930 provides for the case where the debtor shall have impugned the creditor's statement as to amount, it being further provided by article 936 that in such cases "evidence upon the issue shall be taken, should the judge deem it necessary, when any of the parties shall request it."

It is submitted with great deference that these articles of the Code of Civil Procedure have no bearing upon the present case for two reasons:

1st. Because the plaintiff in error, Fernandez, was not a party plaintiff in the attachment proceeding.

2d. Because the United States provisional court for Porto Rico, in which the attachment proceedings were had, was

without judicial power or authority to adjudicate in that case, in conformity with the provisions of the Spanish Code of Civil Procedure, damages against Fernandez.

As has been heretofore suggested, the plaintiff in error, Fernandez, in the present case was not a party, either plaintiff or defendant, in the attachment proceeding. His connection with that case was solely in the guise of an agent or representative of the plaintiff. In procuring the institution of the action he claimed to be authorized so to do by a power of attorney from his principal. Whether his claim in such respect was well founded or whether, in causing the attachment to be levied upon Perez's property, he acted in good faith and upon probable cause are matters of fact with which this court can have no concern. The jury heard the evidence thereabouts and decided the issue against him. If the United States provisional court for Porto Rico, whose jurisdiction Fernandez invoked in behalf of Aguerria, had no power in that proceeding to award, either against Aguerria or any other person acting in his behalf, damages which the defendant may have suffered by reason of the wrongful institution of the cause, it would seem that the right to recover the same in this action under the general provisions of article 1902 of the Civil Code would be beyond question.

The United States provisional court for Porto Rico was established by General Orders No. 88, from which quotations at considerable length will be found at pages 16 and 17 of main brief for defendant in error.

By article II of said General Orders the judiciary power of said provisional court was extended "to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified."

Article IV thereof is as follows: "The decisions of said

court shall follow the principles of common law and equity as established by the courts of the United States, *and its procedure, rules, and records shall conform as nearly as practicable to those reserved and kept in said Federal courts.*"

Article V declares that "the jury may be introduced or dispensed with in any particular case, in the discretion of the court;" and article VI declares that "the judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States."

Both Aguerria and Fernandez were subjects of Spain—the former a citizen of Spain, the latter seemingly a resident of Porto Rico. Whatever might have been the regular procedure, so far as the recovery of damages is concerned, had Fernandez, acting for his principal, Aguerria, resorted to the proper insular court in connection with the attachment proceedings against Perez, and however Perez might then have been bound by the forms and methods of procedure provided by the articles of the Code above quoted governing the assessment of costs and damages, it is certain that the methods of procedure so provided neither helped nor hindered the parties to the action in the provisional court, for in the very authority which established that court it was expressly declared that "its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts."

It is certain that there is no procedure known to the circuit and district courts of the United States by which Federal judges sitting therein are required or authorized to determine and assess damages alleged to have been suffered by reason of the wrongful suing out of an attachment, for an attachment proceeding is not a case of equity nor of admiralty nor maritime jurisdiction, and section 648 of the Revised Statutes of the United States, which but restates a provision of the judiciary act of 1789, provides that "the trial of issues of fact in the circuit courts shall be by jury

except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy," and except (Sec. 649, R. S. U. S.) "the parties or their attorneys of record waive a jury, in which case issues of fact may be tried by the judge. This is consonant with article VII of the amendments of the Constitution concerning the preservation of the right of jury trial in civil causes where the amount in dispute exceeds $20.

By the act of April 12, 1900, the provisional court above referred to was abolished, and the district court of the United States for the district of Porto Rico was declared to be its successor and authorized to "take possession of all records of that court and take jurisdiction of all cases and proceedings pending therein."

Section VIII of said act of April 12, 1900, provides that the laws and ordinances of Porto Rico in force shall continue except as "altered or modified by military orders and decrees in force when this act shall take effect and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable."

It is certain that the above quoted provisions of the Revised Statutes of the United States (sections 648, 649) were not locally inapplicable, although they may be and they were certainly inconsistent and in conflict with the method of procedure concerning the determination of issues of fact provided by the Civil Code in so far as the assessment of losses and damages incident to a wrongful attachment is concerned.

Article 914 of the Revised Statutes of the United States, which declares that "the practice, pleadings, and forms of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, *shall conform as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or

district courts are held," neither helps the plaintiff in error nor throws any particular light upon the real point here under discussion, for it is well settled that the local law and practice cannot be recognized as a rule of procedure in the courts of the United States where its adoption would be repugnant to the Federal Constitution or impair the effect of any Federal legislation.

Virginia Coupon Cases, 114 U. S., 303.

Luxton *vs.* North River Bridge Co., 147 U. S., 338.

Whenever Congress has legislated upon any matter of practice, and prescribed a rule for the government of its own courts, it is to that extent exclusive of the State legislation on the same subject.

Southern Pac. Co. *vs.* Denton, 146 U. S., 209.

This section (914) has no bearing upon the question of the judicial power of the Federal courts, for their jurisdiction is defined definitely by other statutory provisions. Section 914, if it applies at all to the matter in hand, must be construed in conjunction with sections 918 and 958 of the Revised Statutes, and full effect should be given to each of said sections. Section 914 does not require exact conformity, but only conformity "as near as may be." The circuit courts, subject to the requirement of general conformity and in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the Supreme Court, may "regulate their own practice as may be necessary or convenient for the advancement of justice."

If it be true that the Porto Rican procedure required a defendant in attachment proceedings to demand the liquidation of his damages by the trial judge *in that action* on pain of losing all right to indemnification, it is nevertheless true that section 914, Revised Statutes of the United States, does not require any such procedure to be followed in the Federal court for Porto Rico, for to do so would be to deny the

precise regulations of the Federal Constitution and laws governing the trial of issues of fact by jury, except in certain cases of waiver by the parties to the cause. But in any event section 914, Revised Statutes of the United States, has no application to actions of attachment or to cases involving the execution of judgments in common-law causes. In such cases the procedure of the Federal courts is controlled by sections 915 and 916 of the Revised Statutes of the United States, and the Federal courts are thereby authorized "from time to time, by general rules, (to) adopt such State laws as may be in force in the States where they are held in relation to attachment and other process."

It was the intention of Congress to further uniformity "largely through the discretion of the Federal courts, exercised in the form of general rules adopted from time to time."

Shepard *vs.* Adams, 168 U. S., 625.

It may be true that the adoption of the State practice need not be evidenced by rules in writing, but in the absence of a long-continued or established practice and in the face of at least seemingly adverse statutes, some showing should have been made indicating that the Federal court for Porto Rico had adopted *pro hac* the local law and procedure upon which plaintiff in error now relies.

That such adoption had not taken place is evidenced by the lack of objection on the part of plaintiff in error in the trial court; but, if it was necessary so to do, very respectable authority could be vouched for the assertion that a defendant in attachment proceedings is not confined to that action solely for a recovery of his damages in cases where the attachment was not well brought.

For example, José Leach, by agreement and for value, transferred to Doña Maria Clot a drug store established in a certain house.

The owners of the house sued Leach for rent in arrears

and issued a writ of attachment, which was levied upon the drug store and contents. Doña Maria Clot brought her action *en tercería* (replevin) against said Leach and the house owners (plaintiffs in attachment) to recover possession of the property, and at the same time in that action demanded her damages for the wrongful attachment.

The plaintiffs in attachment subsequently dismissed their action to recover their rents, and also dismissed their attachment, but the independent action of Doña Maria Clot in replevin was pressed by her and judgment for the goods rendered in her favor, but she was denied damages because it did not appear in fact that she had suffered any.

On appeal to the supreme court of Spain the judgment of the lower court was affirmed, the supreme court saying:

"Whereas the decision of the lower court setting aside the action for damages is based upon the reason that plaintiff Doña Maria Clot did not prove or even attempt to prove the alleged damages, such reason is sufficient to disregard the motives 2nd and 3rd of the present appeal, because although it is true that he who wrongfully obtains an attachment must make good all of the damages resulting therefrom, it is equally true that it is necessary that a certain damage be done in order that it may be repaired."

Decision of December 16, 1903, "Biblioteca Juridica de la Revista General de Jurisprudence," vol. 96, pp. 909–919.

It will be noted that this case distinctly recognizes the right of the injured party in the case of wrongful attachment to recover damages is a suit other than the attachment proceeding itself, for here the attachment case had been finally disposed of without any reference to damages, which were sought solely in the replevin proceedings, and it is plainly inferable from the decision that had damages been proved judgment would have followed. This case alone would seem to fully meet the reiterated challenge of counsel for plaintiff in error upon this point.

But there is more of interest in this connection.

The Law of Civil Procedure in force in Spain up to the year 1881 and in Porto Rico up to the year 1885, in which the new law was adopted, contains the following provisions regarding provisional seizures, to wit:

"Art. 939. If the attachment is not ratified in the respective suit within twenty days after it having been executed, it shall be null *de jure*, and if in order to prevent the same a surety was given, such surety shall be canceled at the instance of the person who gave the same, or at the instance of the defendant, without any hearing or notice whatever.

"The costs already caused and those which may cause the vacation of the attachment, as well as the costs caused in the execution and cancellation of the surety, shall be adjudged against the plaintiff."

"Art. 940. A person who has secured an attachment shall bring his suit within the precise term of eight days if the owner of the attached property has so requested; failing the plaintiff to so do, the attachment shall be vacated and all the costs, losses and damages shall be adjudged against him."

The foregoing provisions practically correspond with articles 1411 and 1415 of the actual Law of Civil Procedure of Spain and with articles 1409 and 1413 of the law in force in Porto Rico at the time the attachment was sued out, as will appear from the comparative table of both laws printed at pages 1114 to 1120, volume 4, of Alcubilla, "Diccionario de la Administración Española."

Don José Maria Manresa y Navarro (referred to in the brief for plaintiff in error), in his commentaries upon the Spanish Law of Civil Procedure of 1885, at page 253, volume 4, dealing with the above-quoted provisions, speaks as follows (translation):

"In all these cases, when the eight days have elapsed and the suit has not been brought, besides to vacate the attachment, or to give back the amount of money deposited, or to cancel the surety, the plaintiff shall be adjudged to pay not only all the costs but also the losses and damages which

might have suffered his adversary by the provisional seizure. So is expressly order in article 940; and although article 939 has not a similar provision because in paragraph 2 thereof it speaks only of costs, nevertheless, such a provision should be implied, since both articles are identical and the general principles of the law so require. Moreover, article 932 (art. 1400 of the Code of P. R. of 1885) shows that this responsibility is upon plaintiff in the one case as well as in the other. The costs may be demanded at once through the proceedings established by articles 892 and 893, taxing them beforehand in accordance with article 78 *et seq.* But REGARDING THE LOSSES AND DAMAGES, it shall be necessary that the person concerned thereabouts SHALL INSTITUTE THE RESPECTIVE ORDINARY SUIT IN ORDER TO FIX THEIR AMOUNT according to paragraph 2 of article 63 (arts. 927 *et seq.* of the Code of P. R. of 1885), since it is impossible either to determine their amount in a liquidated sum or to establish the basis of liquidation in the kind of decree we are dealing with, which decree must be openly entered without any notice whatever and even without the hearing of the adjudged party."

Is it not certain from this that the contention of plaintiff in error that "losses and damages" must be determined in the attachment proceedings itself or not at all is erroneous? It seems plain, as thus explained, that sections 927 *et seq.* in such case contemplate the institution of a separate suit—an "ordinary action" to recover the damages which he may have suffered, in which the opposite party shall have both notice and an opportunity to be heard.

Under the Spanish codes with respect to the enforcement of certain rights there are two kinds of actions, viz., (1) the general or ordinary action and (2) the special action. The rules respecting the general or ordinary proceeding govern all cases in which special proceedings are not prescribed by law. (See articles 480 *et seq.* of Code of Procedure.)

Articles 1410 and 1411 are rules of summary procedure applicable to the cases therein specified, but they do not

purport to be exclusive or displace the general proceedings prescribed by law for the ordinary declaratory action.

And so it is confidently asserted that damages arising from wrongful attachment, when not fixed upon the dissolution thereof, may be sued for in the ordinary way in the declaratory action and the amount of such damages will be assessed in accordance with the provisions of articles 927 *et seq.* of the Code of Procedure.

Construing provisions of the antecedent legislation corresponding to articles 1410 and 1411, the Supreme Court of Madrid says:

"A provisional seizure having been requested and obtained at the expense and risk of the plaintiff, and said seizure being declared null by a final judgment, the plaintiff must be adjudged to pay the cost, because in the payment thereof the defendants would suffer damage to their interests, and the person who causes an injury is liable for the damages directly caused and also for all the consequences of the wrongful action, according to law 3, title XV, partida 7."

Decisions of November 26, 1857, and April 7, 1868, reported in "Derecho Procesal de España," by Robles Pozo, vol. 2, page 188.

Considering article 1411, in the light of the foregoing, it will appear that the first paragraph thereof is mandatory and that in cases where the attachment has been dissolved, for any of the causes therein recited, none of which apply to the pending case, it is the duty of the judge to assess immediately the damages in that case; but where the attachment is dissolved under the second paragraph, "for any other cause," as here, the provisions with respect to damage appearing in that paragraph are directory merely, and the judge may or may not decide in that case, with respect to damages, "what may be proper."

In this connection and as bearing upon this question by

way of analogy at least, the following decisions of the Supreme Court of Madrid are interesting:

Jurisprudencia Civil, Decision No. 303 of July 6, 1885, volume 58, p. 265;

Ibid, Decision No. 235 of July 21, 1893, volume 73, p. 954.

The mere absence of decisions by the Supreme Court of Madrid upon a particular point of civil law would denote nothing as to the meaning or applicability of said law. In civil jurisprudence decisions occupy a different position and different relation to the body of the law than they do in countries wherein the common law prevails. The lesser importance of decisions in the former case is evidenced by the lack of indexes and digests by which they may be readily identified in connection with any disputed principle or article of the Code.

Much more might well be found by further search, but it could only serve to extend the covers of this brief, for, as above suggested, the defendant (plaintiff in error) here, whose malicious acts caused the injury for which damages are sought, was not a party in the attachment proceedings, nor was the attachment vacated for any of the reasons nor in any of the modes prescribed by the first paragraph of article 1411 of the Code of Procedure, but, on the contrary, the further prosecution of the attachment proceedings, which had been brought in the Federal provisional court under its rules of procedure, was stayed by the writ of injunction issuing out of the district court for Porto Rico, the successor under Federal law of the former court, which writ of injunction was issued at the instance of a stranger to both of the parties to the attachment suit.

As Fernandez was not a party to the record in the attachment suit, to hold that Perez was limited to that action for his relief would be to hold that he was totally without

remedy as against Fernandez, who personally by his malicious acts had wrought the damages of which Perez complained.

So far as anything to the contrary appears from this record, the plaintiff, Aguerria, in the attachment proceedings may have been a myth, or if he lived his name may have been used by Fernandez in that proceeding without authority, and merely as a means of wreaking malice or venting his spleen.

Fernandez by his malicious acts wrought a wrong and injury to Perez. Under the Spanish Civil Code he was bound to repair it. The district court for Porto Rico, having concurrent jurisdiction of the subject-matter with the local courts of Porto Rico, had jurisdiction to administer this cause by reason of the citizenship of the parties. No error appears upon the face of the record and none has been preserved by the bill of exceptions. The judgment of the district court for Porto Rico should be affirmed.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for the Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 1.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Opposition of Defendant in Error to Motion for an Order Directing the District Court to Issue a Writ of Restitution Herein.

Where the specific thing of which a party to the cause has been deprived by a judgment, subsequently reversed on appeal, or the amount that he has lost or paid under compulsion *appears* of *record*, a writ of restitution will ordinarily be granted upon motion. The right to such relief has been recognized in the law of England from early times.

In ANONYMOUS, 2 Salkeld, 588, Holt, C. J., held that—

"where the plaintiff has execution, *and the money is levied and paid*, and that judgment is afterwards reversed, there

because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias* suggesting the matter of fact, viz. the sum levied," etc.

This same doctrine has been fully recognized by this court.

Bank of U. S. *vs.* Bank of Washington, 6 Peters, 8, 17.
Northwestern Fuel Co. *vs.* Brock, 139 U. S., 216, 219.

In the bank case above cited, where the mode of procedure to effect restitution was under discussion, this court said:

"Sometimes it is done by a writ of restitution, without a *scire facias, when the record shows the money has been paid*, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salkeld, 587–'8; Tidd's Prac., 936, 1137–'8. And no doubt, circumstances may exist where an action may be sustained to recover back the money."

In the case at bar it does not appear from the record or otherwise that the execution which was issued pursuant to the judgment here reversed was levied, or what, if any amount, was ever paid on account thereof.

Counsel for plaintiff in error in their motion under discussion say:

"We are advised that the execution was subsequently levied upon the property of plaintiff in error and the full amount of the judgment collected."

This is the only suggestion appearing anywhere in connection with the case that the judgment has been executed in whole or in part, and is not a sufficient showing under

the authorities relied upon by the applicants for restitution to justify such relief.

The right of applicants to restitution not being clear upon the record as now constituted, the entire matter should be left to the action of the trial court, which, upon application, would doubtless issue promptly a *scire facias quare restitutionem habere non debet.*

It is submitted that the pending motion should be denied.

F. H. DEXTER,
F. D. MCKENNEY,
J. S. FLANNERY,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 1.—October Term, 1905.

José Antonio Fernandez y Perez, Plaintiff in Error, vs. José Perez y Fernandez.	In error to the District Court of the United States for the District of Porto Rico.

[April 23, 1906.]

An action at law was begun November 18, 1901, in the United States District Court for the District of Porto Rico by the defendant in error, José Perez y Fernandez, against José Antonio Fernandez y Perez, to recover in an action for "trespass upon the case for wrongful attachment." The declaration contained the usual averments of a declaration in a common law action and averred that the attachment had been issued maliciously and without probable cause, and levied upon a certain two-story house then belonging to the defendant in error, in Mayaguez, Porto Rico. One Rafael Diaz Aguerria was made co-defendant, and it was averred that the attachment was issued in a suit brought by Fernandez as attorney in fact and agent of Aguerria, who authorized and ratified the acts complained of. It appeared that the defendant in error Perez had owed about 6,000 pesos to one Claudio Barro, who died, leaving a will in which Rafael Diaz Aguerria was named as executor. The will was probated in Spain, and Aguerria qualified there as executor of the estate. Perez, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 pesos. The suit in which the attachment was issued was begun January 2, 1900, by the filing of a declaration to recover on certain notes, and was brought in the name of Aguerria as executor of the last will and testament of Claudio Barro. The action was begun in the military court established by the authority of the United States after the cession of Porto Rico, called the United States Provisional Court for the Department of Porto Rico, which court was succeeded by the United States District Court. On the date of the beginning of the suit an affidavit for attachment was filed, which was sworn to by Fernandez, plaintiff in error, purporting to have the power of attorney of Rafael Diaz Aguerria, executor of the last will and testament of Claudio Barro, the ground alleged being that the affiant had reason to believe that the defendant intended to and would fraudulently part with or conceal his property before judgment could be recovered against him, so that the judgment could not be satisfied out of the property. The summons was issued, and a writ of attachment was levied upon the premises of the defend-

ant in error, and notice posted thereon. Further proceedings were arrested by an injunction proceeding in the United States court, brought by Jacinto Perez Barro, heir of Claudio Barro, deceased, upon the ground that Aguerria, plaintiff in the attachment proceeding, suing as executor of the will probated in Spain, had not taken out ancillary letters in Porto Rico. The action for malicious attachment was joint in form and the summons was returned as to Aguerria that the marshal was unable to find him within his district. The declaration averred that he was a resident of Porto Rico, but he was never served with summons in this case. Fernandez demurred to the declaration, averring that it appeared on its face that he was acting as the duly authorized agent of Aguerria, and was neither principal nor party plaintiff to the action against Perez, the defendant in error. This demurrer was overruled, and no exception taken to such action by Fernandez. Afterwards the general issue was filed, the case was tried to a jury without objection and upon a charge of the court, substantially leaving to the jury the question whether Fernandez had caused the attachment to issue and be levied maliciously and without probable cause, to the injury of the standing and credit of the defendant in error as a merchant. A verdict was returned in favor of the defendant in error for the sum of $7,000, upon which a motion for a new trial was overruled and judgment entered.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

This case was argued orally and upon briefs at the October term, 1904, of this court. After the case had been argued and submitted, on December 5, 1904, an order was entered as follows:

"No. 6. *José Antonio Fernandez y Perez, Plaintiff in Error*, v. *José Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:

"1. Can this court, on the record of this case, properly consider and determine the contention of the plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

"2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

"3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution of discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

Our views in this case will be practically in answer to these questions.

The case affords a striking illustration of the difficulty of undertaking to establish a common law court and system of jurisprudence in a country

hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a state following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a common law state.

Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. (*Kepner* v. *United States*, 195 U. S. 100, 122.) This policy has been followed in dealing with the Porto Ricans. (President's Message, Dec. 5, 1899; Walton's Civil Law in Spain and Spanish America, 594.) The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act. (31 Stat. 77.) Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The first inquiry then to which we shall direct attention concerns the law in force at the time of the passage of this act in Porto Rico, governing the issuing of attachments and the recovery of damages for wrongfully causing the same to issue and be levied. The additional briefs filed by counsel upon both sides in this case since the order of the court of December 5, 1904, above quoted, exhibit commendable zeal and industry in investigating this question and bringing to the attention of the court the Spanish treatises and cases throwing light upon the subject. Upon behalf of the defendant in error it is insisted that the action is governed by Article 1902 of the Civil Code of Porto Rico, which provides: "Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done." (War Department Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines, 244.) Much discussion is had in the briefs as

to the meaning of this section, and whether the term "fault"—"culpa" in the Spanish jurisprudence—is broad enough to include actions brought to recover for conduct which is alleged as malicious, as distinguished from those where the basis of the recovery is a careless act or omission which does not have for its motive the intention to cause damage.

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the code. The references to sections of the Code of Procedure show a comprehensive system specially provided for the issuing of attachments and the recovery of damages where the same were wrongfully procured to be allowed. The subject of attachment of property is treated in Title XIV, Law of Civil Procedure, War Department translation, Article 1395 *et seq.* Unlike ordinary American procedure, an attachment is issued by order of the judge and certain grounds are recognized. They are summarized as follows: "If the debtor be a foreigner; or if, being a citizen he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded, It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business, leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors." (Art. 1398.) If it shall turn out that the attachment was wrongfully procured, ample provisions are made for the adjudication and recovery of damages in the action. See Articles 1409–1415, which are set forth in the margin.*

The theory of these sections of the code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indem-

*ART. 1409. A person who has requested and obtained a provisional seizure for an amount of more than 1,000 pesetas must request the ratification thereof in an executory action or in the declaratory action which may be proper, filing the corresponding complaint within twenty days after the levying of the attachment. Upon the expiration of this period without the action having been instituted or a ratification of the seizure having been requested, the latter shall be null *de jure*, and shall be without effect at the instance of the defendant without the plaintiff being heard. A petition for a rehearing may be made against this ruling, and if it should not be granted, an appeal for a stay and review of the proceedings may be interposed.

ART. 1410. Notwithstanding the provisions of the foregoing article, if the debtor should be included in any of the cases of Article 1398, the provisional seizure may

nify the defendant for such losses and damages. And these losses and this recovery are adjudicated in the manner pointed out in Articles 927 *et seq.* of the Code of Civil Procedure. These articles are found in Title VIII of that code, ntitled "Execution of Judgments." The defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. Section 927 *et seq.* provide for the manner of making up an issue, taking testimony and hearing witnesses, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive

---

also be ordered after the institution of the action, a separate record being made thereof. The provisions contained in Articles 1399 to 1410, inclusive, shall be applicable to this case, and after the attachment has been levied the proceedings thereupon shall be continued as prescribed for incidental issues. When an attachment is vacated by a final ruling, because it is not included in any of the cases of said Article 1398, the plaintiff shall be taxed all the costs and be adjudged to indemnify the defendant for any losses or damages he may have suffered, which shall be recovered in the manner prescribed in Article 1415.

ART. 1411. When the provisional seizure becomes of no effect by reason of its having become null *de jure*, in accordance with Article 1409, the surety shall be ordered cancelled in the same ruling, if any should have been furnished, or what may be proper shall be ordered for vacating the attachment and cancelling the cautionary notice, in a proper case, and all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendants for any losses and damages he may have incurred. If the attachment should be vacated for any other reason, the ruling thereupon shall also determine what may be proper according to the cases with regard to costs and the indemnification of losses and damages which may have been suffered.

ART. 1412. If the acknowledgment of a signature or of the written evidence of a debt should not be made or be delayed through the fault of the debtor, and if the filing of the complaint and the ratification of the attachment should depend thereupon, the time lost in obtaining said acknowledgment shall not be included in the period of time prescribed in Article 1409.

ART. 1413. If the owner of the property seized should request it, the attachment creditor must file his complaint within the period of ten days, unless any of the circumstances mentioned in the foregoing article is attendant. Should he not do so, the attachment shall be vacated, and the costs, losses and damages shall be taxed against him.

ART. 1414. After the provisional seizure has been levied the debtor may object thereto and request that it be vacated, with indemnification of losses and damages, if not included in any of the cases of Article 1398. He may make this petition within the five days following that of the notice of the ruling ratifying the seizure, or before that time, if he should deem it proper, and it shall be heard and determined in a separate record in accordance with the procedure prescribed for incidental issues.

ART. 1415. In cases in which there is an adjudication of losses and damages, as soon as the ruling thereupon becomes final, they shall be recovered according to the procedure established in Articles 927 *et seq.*

statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any cause, would seem to preclude the application of general provisions of the code giving a right of recovery for acts of fault or negligence.

We are not cited to any decision of the Supreme Court of Spain expressly adjudicating this matter, but are referred by counsel on both sides to a treatise on the law of civil procedure, ("Commentario a la Ley de Enjuiciamiento Civil," Edition of 1891, p. 412,) by Senor José Maria Manresa y Navarro, said to be a text-writer of the highest authority in Spain. The English translation of his text is given as follows: "We do not think that this rule [relating to independent actions for damages under the mortgage law] is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court, an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in Article 1417,* that is, according to the procedure in Article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions without the necessity of a new suit, which is precisely what the law has sought to avoid." This seems to be a direct authority for the proposition that this plan of recovery of damages for wrongful attachments is exclusive. In the absence of authority to the contrary, and in view of the plain provisions of the code, we accept it as properly declaring the existing law upon the subject. We reach the conclusion that the Porto Rican system in force at the time of the passage of the Foraker act, and binding until changed or amended, provided in the state of affairs shown by this record, a recovery for damages in the method pointed out in the attachment suit, by the special statutory method provided for, and not otherwise.

The difference between the liability of one wrongfully levying an attachment at common law and the assessments of costs and damages under these provisions of the Porto Rican code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the code remedies given in Porto Rico the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases, where the attachment is vacated, irrespective of the motive in suing it out.

---

*Art. 1415, Porto Rican Code.

This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker act established a United States District Court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provides that it shall proceed therein in the same manner as a Circuit Court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both District and Circuit Courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." The act of August 30, 1888, (25 Stat. 433,) provides that the Circuit Courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

In the Revised Statutes of the United States, section 915, it is provided as to attachments: "In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held, for the courts thereof; and such Circuit or District Courts may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy." By analogy it would seem that the District Court of Porto Rico, exercising the jurisdiction of a Circuit Court in its practice as to the issuing of attachments, is to adapt itself to the local practice

recognized and established in Porto Rico. Circuit Courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the State in which the courts are held. (*Bates et al.* v. *Days*, 17 Fed. Rep. 167.)

It is further objected on the part of the defendant in error that Porto Rican procedure can have no application to this action against Fernandez, because he was not a party plaintiff to the attachment suit, and the statute provides that the costs of the attachment and damages shall be assessed against the plaintiff in the action. We do not perceive that this fact affects the determination of the question as to the proper remedy in such cases. There is nothing in this action to show that Fernandez was not authorized to bring the suit and take out the attachment in behalf of the plaintiff in that suit, in which event Aguerria would be liable for the acts of his agent in that behalf. Nor is there any reason why Fernandez might not be made a party to the attachment proceeding if damages were to be assessed against him alone.

It is further objected that the United States court has no method by which it can assess these damages in the manner required in the Porto Rican code. In giving the remedies provided therein and assessing the damages we see no reason why that court cannot adapt itself to the requirements of the local code and administer the remedies therein provided. In *Traction Company* v. *Mining Company*, (196 U. S. 239,) it was held that the Federal court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the needs of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a Circuit Court of the United States administered in such courts it was held: "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States." In view of the provisions of the Foraker act, continuing local laws in force, this reasoning has application to the powers of the United States court in that territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that code. The procedure is simple and easily administered. Nor is there anything in that special procedure

encroaching upon the right to a jury trial, secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which is not necessary to decide—that that part of the Constitution is applicable and in force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized.

Nor would the general provisions of the Revised Statutes, (sec. 648,) providing for a jury trial as to issues of fact in Circuit Courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican code as to assessment for damages for wrongful attachment.

Section 8 of the Foraker act, as we have seen, continues in force the laws and ordinances of Porto Rico, except as modified by military orders and decrees in force, so far as the same are not inconsistent or in conflict with the statutory laws of the United States, which by sec. 14 of the act, when not locally inapplicable, with certain exceptions, are declared to be in force and effect in Porto Rico as in the United States. The general provisions as to jury trials in civil causes in Circuit Courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.

If we are right in holding that the Porto Rican law and practice as to attachments and the recovery of damages in respect thereto are controlling in a Federal court in that territory, and a common law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the court had no jurisdiction of the action. The record shows that practically no exception was taken in the record and proceedings in the trial court, but it is familiar law that this court will of its own motion inquire into the jurisdiction which it has and as well that of the court below, without any special exception being taken. If, as illustrated in the brief for counsel for the plaintiff in error, a Circuit Court of the United States should undertake to entertain a bankruptcy proceeding or an admiralty cause, its proceedings would be void for want of jurisdiction. So, in the present case, there being no such common law action enforcible under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself. (*Parker* v. *Ormsby*, 141 U. S. 81; *Mansfield Railway Co. etc.* v. *Swan*, 111 U. S. 379; *Thompson* v. *Railway Co.*, 6 Wall. 134.)

We, therefore, reach the conclusion that the United States District Court had no jurisdiction of this action, and consequently the proceedings had therein were null and void.

Judgment reversed.

Mr. Justice WHITE dissenting:

As it is conceded that the question upon which the judgment is now reversed was not saved in the court below, I am constrained to dissent. In my opinion the error, if any, was a mere question of mode of procedure, involving no want of jurisdiction *ratione materiæ*, even conceding that the presence of a question of such a character would authorize this court to reverse—in the absence of any exception in the court below—or any reference to the question in that court.

Mr. Justice MCKENNA concurs in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.